IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 509

THE CITY OF TACOMA, A Municipal Corporation,
Petitioner,

v.

THE TAXPAYERS OF TACOMA, WASHINGTON, and ROBERT SCHOETTLER, as Director of Fisheries, and JOHN A. BIGGS, as Director of Game, of the State of Washington, and THE STATE OF WASHINGTON, a Sovereign State,
Respondents.

APPENDIX

TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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APPENDIX A

(No. 33706. *En Banc.* February 7, 1957.)

THE CITY OF TACOMA, *Appellant*, v. THE TAXPAYERS OF TACOMA *et al.*, *Respondents and Cross-Appellants.*[1]

Cross-appeals from a judgment of the superior court for Thurston county, No. 26572, Wright, J., entered November 6, 1956, upon findings in favor of the defendants, in an action brought under the declaratory judgment act to determine a city's right to issue and sell certain utility bonds and for injunctive relief, tried to the court. Affirmed.

E. K. Murray, Marshall McCormick, and *Frank L. Bannon* (*Robert R. Hamilton* and *James F. Henriot*, of counsel), for appellant.

Lynch & Lynch, for respondents and cross-appellants taxpayers.

The Attorney General, Joseph T. Mijich and *E. P. Donnelly, Assistants*, for respondents and cross-appellants Schoettler *et al.*

A. C. Van Soelen, Glen E. Wilson, and *Frank P. Hayes, amici curiae.*

WEAVER, J.—This action was instituted by the city of Tacoma against the taxpayers of Tacoma and the directors of game and fisheries of the state of Washington, pursuant to the declaratory judgment act (RCW 7.24.010, *et seq.*) and RCW 7.24.150, *et seq.*, to test and determine plaintiff's right to issue and sell certain utility revenue bonds to finance the construction of two power dams on the Cowlitz river in Lewis county.

The action was commenced in Pierce county; later, by stipulation and order of court, it was transferred to Thurston county.

[1] Reported in 307 P. (2d) 567.

The case was here on a prior appeal. *Tacoma v. Taxpayers*, 43 Wn. (2d) 468, 262 P. (2d) 214 (1953). This court reversed the judgment of dismissal entered by the trial court after sustaining defendant taxpayers' demurrer to the original complaint. (We refer to that decision for an understanding of the material facts involved on the first appeal.)

The case was remanded to the superior court for further proceedings in accordance with the views therein expressed.

Preliminary to a discussion of the merits of this case, we point out that the city of Tacoma was granted a license by the Federal power commission, after hearings held in 1951, to construct the two dams on the Cowlitz river. The state of Washington, represented by the attorney general; the directors of game and fisheries, cross-appellants; and Washington State Sportsmen's Council, Inc. (not a party to the present case), were given notice of the hearings and appeared before the Federal power commission and actively participated in that proceeding. The parties petitioned the court of appeals for the ninth circuit to review the decision of the Federal power commission (*In the Matter of the City of Tacoma, Washington, Project No. 2016*); the commission's decision was affirmed. *State of Washington Department of Game v. Federal Power Comm.*, 207 F. (2d) 391 (C. A. 9th; 1953), cert. den. 347 U. S. 936, 98 L. Ed. 1087, 74 S. Ct. 626 (1954).

The proceedings in the superior court, between October 14, 1953, the date the remittitur of this court was filed, and March 6, 1956, the date of the final judgment from which the present appeal and cross-appeal are taken, are set forth in the lengthy transcript on appeal. It would unduly extend this opinion to give a resume of the various pleadings, motions, and orders.

After our former opinion, the trial court entered an order overruling taxpayers' demurrer to the complaint. The tax-

payers of Tacoma filed an answer and cross-complaint, denying that the Federal license had any legal force or effect, and affirmatively alleged that the city had exceeded its authority under the state statutes. The city's demurrer was sustained to the cross-complaint.

April 29, 1954, the directors of game and fisheries filed a second amended answer and cross-complaint that, in substance, was similar to prior pleading, except they alleged, for the first time, that the Cowlitz river is nonnavigable at the dam sites.

April 29, 1954, the city of Tacoma filed a petition praying that attorneys' fees as costs be fixed and determined, and that the city's liability for further legal services be terminated in accordance with the provisions of the declaratory judgment act. The petition stated that nothing further remained to be done by the taxpayers of Tacoma, except to establish the allegations of the complaint (if denied) and enter judgment. The prayer requested that the taxpayers be denied costs for attorneys' fees in connection with their cross-complaint.

On the same date, the taxpayers of Tacoma answered. They said they had done all that was expected of them; that they had filed an answer and cross-complaint, because it was the only further step they could take; and that they should be allowed costs and attorneys' fees.

April 29, 1954, the superior court entered an order absolving the taxpayers from any further defense or prosecution of the action. Subsequently, the superior court fixed the amount of attorneys' fees to be paid by the city to the taxpayers.

June 24, 1955, the directors of game and fisheries filed a motion for a temporary restraining order and injunction, *pendente lite*, to enjoin further development and construction of the Cowlitz project and the sale of the proposed bond issue. The affidavit of an assistant attorney general,

filed in support of this motion, alleges that a large portion of certain state highways would be inundated and must, of necessity, be condemned; and that

"Ordinance No. 14386 authorizes the condemnation of the state game hatchery, known as the Mossyrock Hatchery, located on the Cowlitz River. This hatchery is located on Government Lots 4, 7, 8, and 9, Section 11, Township 12 North, Range 2 East Willamette Meridian, in Lewis County, Washington. The state also has a water right there. The reservoir created by the Mayfield Dam will inundate and overflow the entire hatchery. This hatchery site has been segregated from the public domain and already appropriated to a public use.

"The City of Tacoma, being a limited arm of the state government, cannot condemn property such as this already dedicated to a public use. *State v. Superior Court*, 91 Wash. 454, 157 Pac. 1097 (1916). Therefore, the ordinance authorizing such condemnation is invalid and the City is proceeding contrary to the laws of the State of Washington. Affiant alleges that no agreement between the City of Tacoma and State authorities has been reached, and that legislative action will be necessary before Tacoma can build the project. There has been no such legislative action as yet.

"On June 21, 1955, the City of Tacoma awarded bids for the purchase of Tacoma city Light revenue bonds, totalling $15,000,000, to pay for the construction of part of the Mayfield Dam. Affiant is informed and believes that the City will deliver said bonds to the purchasers in the immediate future; on June 22, 1955, the City of Tacoma awarded the contracts for the construction of the Mayfield Dam, and the City intends to authorize the commencement of said construction in the immediate future.

"Affiant is informed and believes that if the threatened acts of the plaintiff in delivering the bonds and commencing construction of the Mayfield Dam are not enjoined pending the outcome of this action, irreparable injury will result to the State of Washington in that part or all of the fish runs in the Cowlitz River will be destroyed for which adequate damages cannot be ascertained. Also, if invalid bonds are permitted to be on the market, the public will suffer and it

is the responsibility of the State of Washington to prevent this."

On the filing of this motion and affidavit, the superior court, *ex parte*, issued a temporary restraining order and order to show cause. It enjoined the city from directly or indirectly developing, constructing, or contracting for the construction of the two dams; from delivering or permitting the sale of any bonds for the payment of costs of the Cowlitz project; and ordering the respective parties to appear at a hearing on the matter on August 8, 1955.

June 28, 1955, the city of Tacoma, appellant, filed a motion to quash and dissolve the temporary restraining order. It was supported by affidavits that stated in substance: (a) that the action had been pending for more than two years; (b) that during this time the directors of game and fisheries had known that the city contemplated calling for bids on contracts and the sale of bonds; (c) that for the past year this action had awaited the ruling of the superior court upon the city's demurrer to the directors' second amended cross-complaint; (d) that the protection of fish in the Cowlitz river was a matter for presentation before the Federal power commission; (e) that all matters proper for determination herein had been decided by the supreme court of this state upon the first appeal. (*Tacoma v. Taxpayers, supra*); (f) that the judgment in the case entitled *State of Washington Department of Game v. Federal Power Comm., supra*, was *res judicata* as to all other matters pleaded by the directors of game and fisheries in their second amended answer and cross-complaint; (g) and, that the continuation of the temporary restraining order would result in irreparable damage to the city of Tacoma. A hearing on the motion to quash was set for June 30, 1955. July 7, 1955, the court modified the temporary restraining order to read:

". . . Plaintiff (appellant) and its officers and agents be and they are hereby restrained and enjoined from doing

any act or thing in any manner interfering with the bed or waters of the Cowlitz River in connection with its Mayfield and Mossyrock Dam Projects, or in any way injurious to the fish runs or fish resources of said river. . . ."

July 27, 1955, the city filed an amended complaint. July 29, 1955, the directors of game and fisheries moved to *substitute* the sovereign state of Washington as a defendant in this action. The affidavit, in support of this motion, alleged:

"The proposed project will affect lands, structures, waters, and fish, the ownership and jurisdiction over which is in the State of Washington *and not in the above-named defendants* (directors of game and fisheries); and, therefore, the real party in interest, of this action, which will be affected by the decision of this Court is the State of Washington."

Over objection of the city, August 8, 1955, the court entered an order granting permission "to add the State of Washington as a party defendant herein . . ."

August 29, 1955, the directors of game and fisheries and the state of Washington filed an answer and cross-complaint to the city's amended complaint. They alleged: (a) that the Cowlitz project would interfere with *public navigation* on the Cowlitz river, which the city is prohibited from doing under the provisions of RCW 80.40.010; (b) that appellant had not obtained an extension of time beyond December 31, 1955, to commence construction; (c) *that the proposed Cowlitz project would damage and destroy state lands dedicated to a public use that the city of Tacoma, as a municipal corporation, is unable to acquire;* (d) that the city had not complied with the provisions of RCW 90.28.010 (permission to inundate state highways), and RCW 90.20.010, *et seq.* (water appropriation permit); (e) and, that the city had attempted to circumvent state laws by commencing an action in Federal district court at Tacoma. (The city states in its brief that it voluntarily dismissed this action.)

September 27, 1955, the directors of game and fisheries and the state of Washington filed a joint amended answer and cross-complaint. It contained, substantially, the same matters as the directors' prior pleading, except that the various parcels of state land devoted to public uses were described by legal description. There was an added allegation and exhibit which, in substance, indicated that the state game commission had passed a resolution August 16, 1955, instructing the director of game to take every legal procedure to resist any effort of the city to condemn or in any manner acquire the Mossyrock fish hatchery, because it was irreplaceable.

October 7, 1955, the trial court entered a restraining order *pendente lite*. It modified the temporary restraining order of July 7, 1955, by inclusion of the following proviso:

". . . PROVIDED HOWEVER, that the plaintiff, its agents, employees and officers, be and they are hereby authorized to construct the coffer dam for the powerhouse site and to do blasting necessary to construction, Provided that no blasting shall take place in the waters of the Cowlitz River."

October 11, 1955, the trial court entered an order, over objection of the city, appointing new attorneys to represent "all taxpayers of the City of Tacoma." The taxpayers, theretofore appointed, had withdrawn from the proceeding and had defaulted within the provisions of the declaratory judgment act.

November 30, 1955, the newly appointed attorneys, upon behalf of all taxpayers, filed an answer and affirmative defense to the city's amended complaint. It contained virtually the same allegations as the amended answer and cross-complaint of the directors and the state of Washington.

January 3, 1956, the parties filed a pretrial conference stipulation and order. It stated: (a) that the city had en-

tered into contracts for the construction of the Mayfield dam, and that construction had been commenced; (b) that two ordinances, amendatory of ordinance No. 14386, had been passed; (c) that a license to build the dams had been issued appellant by the Federal power commission; (d) *that completion of the dams and closing of the gates would inundate a large portion of a fish hatchery, owned and operated by the state, as well as other state land, as described in the pleadings;* (e) that the directors of fisheries and game, if permitted, would show probability of injury to fish; (f) that the city had not yet obtained permission to inundate state highways, under the provisions of RCW 90.28.010, but that plans had been submitted for review to the director of highways; (g) that the city had used and would continue to use surplus funds of its light utility to pay costs of the Cowlitz project, and would issue and sell revenue bonds of its light utility therefor.

January 5, 1956, the trial judge wrote a letter to counsel. We quote, in part:

"After reading briefs the Court feels that testimony can be limited to the question of navigation. . . .

"Upon the question of damage to fish the Court is of the opinion that the decision of the Federal Power Commission and the decision of the Supreme Court of this state are controlling.

"Upon the question of relocation of the fish hatchery, the Court is of the opinion that only a question of law is presented. The question of law will relate to the extent of the powers of condemnation given to plaintiff under the license from the Federal Power Commission."

The case was tried January 11, 1956, upon the city's *amended* complaint, the taxpayers' answer and affirmative defense, and the directors' and state's amended answer and cross-complaint, as limited by the stipulation and the above-quoted letter. Findings of fact and conclusions of law were

made; judgment was entered March 6, 1956. The trial court declared the status of the parties to be as follows:

"It Is Hereby Ordered, Adjudged And Decreed that the question of the capacity of the plaintiff to acquire property of the defendant, State of Washington, by eminent domain is not within the jurisdiction of this court,

"It Is Further Ordered, Adjudged And Decreed that the question of damage to fish which might result from construction of plaintiff's Cowlitz Project was passed upon by the Federal Power Commission and the Federal Courts and is not now a proper one for consideration by this Court.

"It Is Further Ordered, Adjudged And Decreed that Sections 27 and 36, Chapter 117, Laws of 1917, as amended (R. C. W. 90.20.010 and 90.28.060) are inapplicable to said project insofar as the same conflict with the provisions of the Federal Power Act or the terms and conditions of plaintiff's License for said project, or insofar as they would enable State officials to exercise a veto over said project.

"It Is Further Ordered, Adjudged And Decreed that the provisions of Chapter 9, Laws of 1949, (R. C. W. 75.20.010 et seq.), and Sections 46, and 49, Chapter 112, Laws of 1949, as amended (R. C. W. 72.20.050 [sic] and 75.20.100), are inapplicable to said project insofar as the same conflict with the provisions of the Federal Power Act or the terms and conditions of plaintiff's License for said project, or insofar as they would enable State Officials to exercise a veto over said project.

"It Is Further Ordered, Adjudged And Decreed that the plaintiff is acting illegally and in excess of its authority in the construction of the Mayfield and Mossyrock hydroelectric project as presently proposed for the reason that said project *would necessarily impede, obstruct or interfere with public navigation contrary to the proviso of R. C. W.* 80.40.010 *et seq.*

"It Is Further Ordered, Adjudged And Decreed that the injunction pendente lite, entered October 7, 1955, be continued in effect until July 1, 1956, from and after which later date, plaintiff is hereby enjoined from spending any sums of money relating to the Mayfield and Mossyrock hydroelectric project." (Italics ours.)

June 28, 1956, the chief justice continued the injunction *pendente lite*.

The city of Tacoma (appellant) has made fifteen assignments of error. The taxpayers of Tacoma, the directors of game and fisheries, and "The State of Washington, a Sovereign State" (respondents and cross-appellants) have made two assignments of error on their cross appeal.

Although this action has evolved into a Hydra-headed controversy, a single question at its nucleus is determinative of its disposition.

Does a municipal corporation, created by the state as a subordinate unit, have the power to condemn state lands held in a governmental capacity and previously dedicated to a public use; and if not, can a municipal corporation be endowed by Federal legislation with power to condemn such lands belonging to the state?

This question is neither abstract nor academic. The state-owned Mossyrock fish hatchery and the land necessary for its operation, which are of substantial value, will be inundated by the proposed dam. In the sense that the question requires a definition of the powers of the sovereign state and one of its created agencies, the problem is a local one peculiarly within the province of the courts of this state; hence, assuming, *arguendo*, that the question was before the court of appeals for the ninth circuit in *State of Washington Department of Game v. Federal Power Comm.*, *supra* (an erroneous assumption, as we point out later in this opinion), it is not *res judicata* against the state of Washington.

This precise question is presented to us by cross-appellants' (the taxpayers, the directors, and the state) first assignment of error, which reads as follows:

"The court erred in making and entering its conclusion of law No. III and in entering its judgment, dated March 6, 1956, insofar as it included therein paragraph I reading:

" 'IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the question of the capacity of the plaintiff to acquire property of the defendant, State of Washington, by eminent domain *is not within the jurisdiction of this court.*' " (Italics ours.)

The city (appellant and cross-respondent) argues that this question is not before us. Two reasons are given: first, that the taxpayers of Tacoma (respondents and cross-appellants) are precluded by the law of the case as declared on the first appeal to this court; and second, that Robert Schoettler, as director of fisheries, and John A. Biggs, as director of game of the state of Washington, and "The State of Washington, a Sovereign State" (respondents and cross-appellants) are bound by the doctrine of *res judicata*.

In support of these reasons, our former opinion in this case (*Tacoma* v. *Taxpayers, supra*) and the opinion of the United States court of appeals in *State of Washington Department of Game* v. *Federal Power Comm., supra*, are cited, analyzed, and discussed.

If the state of Washington, in its sovereign capacity, is not bound by the theory advanced by the city, we reach the question of the city's power to condemn state lands previously dedicated to a public use. The position of the remaining parties, and the other assignments of error, would not require examination.

We are inclined to the view that the theory advanced by the city does not apply to the taxpayers of Tacoma nor to the directors of game and fisheries. This is based upon the following: (a) in our former decision, the sole question before this court was whether the city's *first* complaint stated a cause of action; (b) neither our former opinion nor the opinion of the Federal court of appeals discussed the question of the city's power and capacity to condemn state-owned property previously dedicated to a public use—in fact, the latter opinion excludes the question; (c) the question did not appear until pleaded *after* we had remanded the case to the trial court; (d) the case is now before us

after *trial* of issues formed by the city's *amended* complaint, filed July 27, 1955, and the answers, affirmative defenses, and cross-complaints thereto.

Since we base our conclusion that the trial court should be affirmed upon other grounds, we do not deem it necessary to expand our reasons for concluding that the taxpayers of Tacoma and the directors of game and fisheries are not precluded by the law of the case and the doctrine of *res judicata*.

The state of Washington, in its sovereign capacity, is not bound by the doctrine of *res judicata* (assuming, *arguendo*, that the issue involved has been before a court of competent jurisdiction), for the manifest reason that *the state was not a party to this action* at the time our former decision was rendered.

The state of Washington became a party defendant by order of court, entered August 8, 1955. The order was entered on motion of the directors of fisheries and game, supported by an affidavit, the allegations of which we quoted *supra*.

An attempt is made to avoid the conclusion that the state did not become a party to this action until August 8, 1955, upon the authority of *State* v. *Pacific Tel. & Tel. Co.*, 9 Wn. (2d) 11, 113 P. (2d) 542 (1941). We do not find the case apposite.

We have not overlooked the fact that the state-owned land involved is not in Pierce county, where this action was commenced, nor in Thurston county, to which this action was transferred by stipulation and order of court; but this is *not* a condemnation action. It involves a determination of the *power to condemn*, not the actual condemnation. In *Donaldson* v. *Greenwood*, 40 Wn. (2d) 238, 250, 242 P. (2d) 1038 (1952), we quoted with approval:

" 'A state can exercise through its courts jurisdiction to order or to forbid the doing of an act within the state, al-

though to carry out the decree may involve doing an act or affecting a thing in another state. 'Restatement, Conflict of Laws, 147, § 97.''

A fortiori, since the parties and the issue were before the superior court of Thurston county, it had jurisdiction to resolve the question of the power of the city to condemn state-owned lands. In this respect, the trial court erred in the first paragraph of its decree, quoted *supra*, in which it said that

". . . the question of the capacity of the plaintiff to acquire property of the defendant, State of Washington, by eminent domain is not within the jurisdiction of this court."

In *Pacific Tel. & Tel. Co.* v. *Henneford*, 195 Wash. 553, 81 P. (2d) 786 (1938), the plaintiff company secured an injunction against the state tax commissioner, enjoining him from collecting a certain use tax. Three years later, the state commenced an action against the company to recover the same tax. In *State* v. *Pacific Tel. & Tel. Co.*, *supra*, this court held that the first action was *res judicata* of the second, saying:

"This court has held that, where an action is brought by or against the officers of a state which affects the right of the state *to collect its revenue*, it is, in effect, an action by or against the state. [Citing cases.]" (Italics ours.)

Thus, the court limited its decision to the particular facts before it; namely, the collection of revenue. Finally, the court announced the guide to be followed when it said:

"The general rule is that a judgment for or against the state or an officer or agency thereof *in matters as to which such officer or agency is entitled to represent the state in litigation*, is conclusive for or against the state. . . .

"The test as to whether a judgment in a prior action brought against officers of the state is *res judicata* as against the state in a second action involving the same subject-matter, *depends upon whether the officers have*

authority to represent the interests of the state in the prior action. *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 84 L. Ed. 1263, 60 S. Ct. 907." (Italics ours.)

The departments and directors of fisheries and game are charged with the duty of enforcing state laws, and rules and regulations of the departments relative to the conservation of food fish and game fish. The directors have statutory authority to represent and bind the state by their actions, only in matters relating to the conservation of food fish and game fish. Under the statutes, their sole concern is the conservation of food fish and game fish; they are not concerned with ownership of lands by the state in its sovereign capacity.

"The State does not legally become a party to a suit brought on its behalf unless the suit is brought by some officer having statutory authority so to do and a suit brought by the State Tax Collector, which he had no statutory authority to bring is not binding on the State, and the decree therein is not res adjudicata against the State." *State* v. *Rogers*, 206 Miss. 643, 39 So. (2d) 533 (1949).

In *People* v. *Birch Securities Co.*, 86 Cal. App. (2d) 703, 196 P. (2d) 143 (1948), the court said:

"It will be observed the former federal judgment, which was offered in evidence as a bar to this action, was merely against certain named officers of the state, as such, and not against the State of California. That case was not a suit against the State of California, and is therefore not res judicata in this action or an estoppel against the state maintaining this action for unpaid franchise taxes. *When a suit is brought only against individually named officers of a state, as such, it is ordinarily not an action against or binding upon the state.*" (Italics ours.)

The state became a party defendant to this action on August 8, 1955, subsequent to the first appeal; hence, neither the doctrine of the law of the case, as purportedly established by our first opinion, nor the doctrine of *res*

judicata applies to the state of Washington, and this court must consider the question posed.

In a recent *En Banc* decision (*State ex rel. Eastvold* v. *Yelle*, 46 Wn. (2d) 166, 168, 279 P. (2d) 645 (1955)), this court said:

"The power of eminent domain is inherent in sovereignty and does not depend for its existence on a specific grant in the constitution. The provisions found in a state constitution do not by implication grant the power to the government of a state, but limit a power which otherwise would be without limit. *State ex rel. Eastvold* v. *Superior Court*, 44 Wn. (2d) 607, 609, 269 P. (2d) 560 (1954)."

In *Lauterbach* v. *Centralia*, 149 Wash. Dec. 528, 532, 304 P. (2d) 656 (December 5, 1956), we again defined a municipal corporation and described its powers as follows:

"A municipal corporation is a body politic established by law as an agency of the state—partly to assist in the civil government of the country, but chiefly to regulate and administer the local and internal affairs of the incorporated city, town, or district. *Columbia Irr. Dist.* v. *Benton County*, 149 Wash. 234, 235, 270 Pac. 813 (1928). *It has neither existence nor power apart from its creator, the legislature*, except such rights as may be granted to municipal corporations by the state constitution." (Italics ours.)

"A municipal corporation does not have an inherent power of eminent domain. It may exercise such power only when it is expressly authorized to do so by the *state legislature*." *Tepley* v. *Sumerlin*, 46 Wn. (2d) 504, 507, 282 P. (2d) 827 (1955), and cases cited. This is consistent with the general proposition that

". . . a municipal corporation, being but a creature of the state, derives its existence, powers, and duties *from the legislative body* of the state. 37 Am. Jur. 620, § 4, and p. 626, § 7. 2 McQuillin, Municipal Corporations (3d ed.) 12, § 4.04; 578, § 10.03." *Othello* v. *Harder*, 46 Wn. (2d) 747, 752, 284 P. (2d) 1099 (1955). (Italics ours.)

Of course, by statute, the state may delegate the power of eminent domain to one of its political subdivisions; but such statutes are strictly construed. Lewis in 1 Eminent Domain (3d ed.) 679, § 371, states:

"The exercise of the power being against common right, it cannot be implied or inferred from vague or doubtful language, but must be given in express terms or by necessary implication. When the right to exercise the power can only be made out by argument and inference, it does not exist. *'There must be no effort to prove the existence of such high corporate right, else it is in doubt; and, if so, the State has not granted it.'*" (Italics ours.)

This is cited with approval in *State ex rel. Chesterly v. Superior Court*, 19 Wn. (2d) 791, 800, 144 P. (2d) 916 (1944).

It follows, that the state may delegate, to one of its political subdivisions, the power to condemn state-owned property. However,

". . . the principal question that arises in connection with the right of a particular subdivision or agency to take state-owned lands is whether the legislature has authorized such subdivision or agency so to do. This is, of course, a problem of statutory construction, and it may be said in this connection that there is a clear tendency on the part of the courts against interpreting governing statutory provisions in favor of the existence of such authorization *in the absence of a clear expression of the legislative intention to that effect*. This tendency is attributable to such considerations as the general principal of statutory construction that where a statute is general in its terms and thereby any prerogative, right, title, or interest is taken from the state, the latter is not bound unless the statute is made to extend to it by express words; the general rule that property devoted to a public use may not be taken under the power of eminent domain for an inconsistent use unless the right to do so is conferred expressly or by necessary implication." (Italics ours.) Annotation: "Eminent domain: power of one governmental unit or agency to take property of another such unit or agency." 91 L. Ed. 221, 259 (1947).

In *State* v. *Superior Court*, 91 Wash. 454, 157 Pac. 1097 (1916), this court held that a statute authorizing railroad corporations to condemn lands, including lands granted to the state, refers to state lands held only in a proprietary capacity, and does not include state lands segregated from the public domain and appropriated to a public use by dedication, saying:

"Indeed, if this be not the rule, the legislature has, by the act in question, granted to railway companies power to condemn any of the state lands for railway purposes (save that of course which is specially exempted), which would include the lands on which its capitol buildings are situated." (p. 459)

The following remark made by this court in *Seattle & Montana Ry. Co.* v. *State*, 7 Wash. 150, 152, 34 Pac. 551, 38 Am. St. Rep. 866, 22 L. R. A. 217 (1893), is pertinent:

"As well might it be contended that because a railroad is authorized to enter upon and condemn 'any' land for its tracks, depots, shops, round houses, etc., it could, by serving notice upon the auditor of Thurston county, take the entire ten acres upon which the state capitol stands for a depot and shops." (p. 152)

In *State ex rel. Attorney General* v. *Superior Court*, 36 Wash. 381, 385, 78 Pac. 1011 (1904), this court said:

"Since the rule prevails that condemnation statutes must be strictly construed, as far as they relate to the taking of private property, it follows, with even more force, that the same rule must apply where the lands of the sovereign are sought to be taken." (p. 385)

We deem it conclusively settled in this jurisdiction that a municipal corporation or a public corporation does not have the power to condemn state-owned lands dedicated to a public use, unless that power is clearly and expressly conferred upon it by statute.

After a careful review of RCW 8.12.030 and RCW 80.40.010, and other statutes to which our attention has

been directed, we do not find that the legislature has expressly authorized a municipal corporation to condemn state-owned land previously dedicated to a public use; hence, we conclude that the city of Tacoma has not been endowed with the statutory capacity to condemn such lands.

There remains the subsidiary question: can a municipal corporation of this state be endowed, by Federal legislation, with power to condemn state-owned lands previously dedicated to a public use, in the absence of power and capacity so to act under state statutes; or, specifically, can the city of Tacoma receive the power and capacity to condemn state-owned lands previously dedicated to a public use, from the license issued to it by the Federal power commission in the absence of such power and capacity under state statutes?

This is not a question of the right of the Federal government to control all phases of activity on navigable streams, nor a question of its power, under the Federal power act, to delegate that right. It only questions the capacity of a municipal corporation of this state to act under such license when its exercise requires the condemnation of state-owned property dedicated to a public use.

The question of the legal capacity of the city of Tacoma to act under the license issued by the Federal power commission is specifically excluded from consideration in *State of Washington Department of Game* v. *Federal Power Comm.*, *supra*. The court said:

"Consistent with the *First Iowa* case, *supra*, we conclude that the state laws cannot prevent the Federal Power Commission from issuing a license or bar the licensees from acting under the license to build a dam on a navigable stream since the stream is under the dominion of the United States. However, *we do not touch the question as to the legal capacity of the City of Tacoma to initiate and act under the license once it is granted.* There may be limitations in the City Charter, for instance, as to indebtedness limitations. Questions of this nature may be inquired into by

the Commission as relevant to the practicability of the plan, but the Commission has no power to adjudicate them." (p. 396) (Italics ours.)

Hence, this case is not *res judicata* against the state of Washington. As we have heretofore pointed out, the city does not have the capacity to act under the license. Its inability to act, in the manner which we have discussed, is inherent in its very nature. *Its inability so to act can be remedied only by state legislation that expands its capacity.*

We find nothing inconsistent with this conclusion in *First Iowa Hydro-Electric Cooperative* v. *Federal Power Comm.*, 328 U. S. 152, 90 L. Ed. 1143, 66 S. Ct. 906 (1946). Therein, the court held (rightfully, we believe) that a state could not, by statute, require the petitioner to secure a state permit to build the dam *when the subject matter of the state statutory prohibitions was exclusively within the jurisdiction of the Federal government.* The court said:

"To require the petitioner to secure the actual grant to it of a state permit under § 7767 as a condition precedent to securing a federal license for the same project under the Federal Power Act would vest in the Executive Council of Iowa a veto power over the federal project. Such a veto power easily could destroy the effectiveness of the Federal Act. It would subordinate to the control of the State the 'comprehensive' planning which the Act provides shall depend upon the judgment of the Federal Power Commission or other representatives of the Federal Government." (p. 164)

In *Tacoma* v. *Taxpayers*, 43 Wn. (2d) 468, 489, 262 P. (2d) 214 (1953), this court said:

"It [the Federal government] intended to exercise its full jurisdiction to authorize the power commission to supersede *state laws purporting to prohibit or limit the construction of dams* on navigable streams." (p. 489) (Italics ours.)

In the instant case, the subject matter—the inherent inability of the city to condemn state lands dedicated to a public use—does not present a question of *state statutory prohibition;* it presents a question of *lack of state statutory power* in the city. It does not present a Federal question; it presents a question peculiarly within the jurisdiction of the state of Washington.

The Federal government may not confer corporate capacity upon local units of government beyond the capacity given them by their creator, and the Federal power act, as we read it, does not purport to do so.

If it be held that the Federal government may endow a state-created municipality with powers greater than those given it by its creator, the state legislature, a momentous and novel theory of constitutional government has been evolved that will eventually relegate a sovereign state to a position of impotence never contemplated by the framers of our constitutions, state and Federal.

In our review of this case under the declaratory judgment statute (RCW 7.25.010), we are limited in our consideration by the plan of construction established by the ordinances of the city of Tacoma and the license of the city of Tacoma received from the Federal power commission, as they appear in the record before us. It is not within the province of this court to give an advisory opinion as to what the law may be under a different plan of construction, which may be established by different ordinances or licenses.

Based upon the present record, we agree with that portion of the judgment of the trial court which determines (1) that the question of damage to fish which might result from construction of the dams is not now a proper one for the consideration of the court; and (2) that Laws of 1917, chapter 117, §§ 27 and 36, pp. 459, 463, as amended (RCW 90.20.010—state permit for appropriation of water; RCW 90.28.060—state permission to build a dam), Laws of 1949,

chapter 9, p. 38 (RCW 75.20.010 *et seq.*—establishing Columbia river fish sanctuary), and Laws of 1949, chapter 112, §§ 46 and 49, pp. 272, 274, as amended (RCW 75.20.050—state permit to divert water; RCW 75.20.100—approval of building plans for the protection of fish), are

". . . inapplicable to said project insofar as the same conflict with the provisions of the Federal Power Act or the terms and conditions of plaintiff's License for said project, or insofar as they would enable State officials to exercise a veto over said project."

Our conclusion is amply supported by *First Iowa Hydro-Electric Cooperative* v. *Federal Power Comm.*, 328 U.S. 152, 90 L. Ed. 1143, 66 S. Ct. 906 (1946).

The same authority supports the conclusion that the trial court erred when it issued the injunction

". . . for the reason that said project would necessarily impede, obstruct or interfere with public navigation contrary to the proviso of R.C.W. 80.40.010 et seq."

However, we have held on many occasions that if the judgment of the trial court is based upon erroneous grounds, it will be sustained, if correct on any grounds within the pleadings and established by the proof. *Ennis* v. *Ring*, 149 Wash. Dec. 279, 283, 300 P. (2d) 773 (1956).

We have already held that the question of the capacity of the plaintiff to acquire property of the state of Washington by eminent domain is within the jurisdiction of the court; and that the city of Tacoma has not been endowed with the statutory capacity to condemn state lands previously dedicated to a public use. Without this power, it cannot accomplish the plan set forth in the city ordinances before us; hence, for the reasons we have discussed herein, the judgment of the superior court is affirmed.

HILL, C. J., SCHWELLENBACH, ROSELLINI, and OTT, JJ., concur.

April 30, 1957. Petition for rehearing denied.

HILL, C. J. (concurring specially)—I have signed the majority opinion, but in fairness to all concerned it should be stated that this case had been assigned to one of the judges whose opinion did not prevail, and the case was not assigned to Judge Weaver for opinion until January 11, 1957.

DONWORTH, J. (dissenting)—I find myself in disagreement with the majority opinion for three reasons, which are stated below. Because of the importance of the constitutional question relating to the conflict between state and Federal powers, I deem it proper to state my views at some length.

My first two reasons, if valid, make it unnecessary to consider the third reason (the constitutional question). They are:

First, respondents (taxpayers of Tacoma) and cross-appellants (directors of fisheries and game, respectively) are precluded from raising the constitutional question because the law of the case was established on the first appeal (43 Wn. (2d) 468, 262 P. (2d) 214).

Second, the state is precluded from raising that question because it and cross-appellants are bound by the decision of the court of appeals for the ninth circuit in *State of Washington Department of Game* v. *Federal Power Comm.*, 207 F. (2d) 391, which is *res judicata* of this controversy.

The third reason is that, even assuming *arguendo* that the two doctrines of the law of the case and *res judicata* are not applicable, the majority opinion is in error in holding that appellant, under the facts shown in this record, has no power to condemn state-owned lands previously dedicated to public use when the legislature has not given it the power to so act.

In considering the first reason stated above, it is necessary to have in mind the issues which were raised or could

have been raised on the first appeal (43 Wn. (2d) 468). The demurrer to the complaint which was before this court on the first appeal admitted all facts well pleaded therein and reasonable inferences to be drawn therefrom. *Slater* v. *Bird*, 40 Wn. (2d) 848, 246 P. (2d) 460, and cases cited.

The demurrer admitted (among other things) that the Federal power commission, in its order of November 28, 1951, had made sixty-six findings of fact, including No. 53 and No. 59, reading as follows:

"The Applicant is a municipal corporation; it has submitted satisfactory evidence of compliance with the requirements of all applicable State laws insofar as necessary to effect the purposes of a license for the project; and it is a municipality within the meaning of Section 3(7) of the Act.

"Under present circumstances and conditions and upon the terms and conditions hereinafter included in the license, the project is best adapted to a comprehensive plan for improving or developing the waterway involved for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, for the conservation and preservation of fish and wildlife resources, and for other beneficial public uses including recreational purposes."

Appellant alleged in its original complaint that ordinance No. 14386, in which it adopted the plan and system therein described and designated as the Cowlitz power development, provided for the acquisition of certain lands by purchase or condemnation. The lands which were to be affected by the project were described in the complaint as follows:

"Acquisition by purchase, condemnation, or otherwise of 16,000 acres of land, more or less, for dam sites, powerhouse sites, *reservoirs and storage basin sites*, operator's villages, tunnels, construction offices; fishways, fish hatcheries and other fish facilities, gravel pits, roads, bridges and necessary right of ways, said lands being located in

"Sections 1, 2, 3, 9, 10, 11, 16, 19, 20, 21, 27, 28, 29 and 30 of Township 12 North, Range 2 East of Willamette

Meridian; Sections 25, 26, 34 and 35 of Township 13 North, Range 2 East, W. M.; Sections 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 22, 23 and 24 of Township 12 North, Range 3 East, W. M.; Sections 7, 18, 19, 20, 27, 28, 29, 30, 32 33, 34, 35 and 36 of Township 12 North, Range 4 East, W. M.; Sections 1, 2, 3, 4, 11 and 12 of Township 11 North, Range 4 East, W. M.; Sections 28, 29, 30, 31, 32, 33 and 34 of Township 12 North, Range 5 East, W. M.; and Sections 2, 3, 4, 5 and 6 of Township 11 North, Range 5 East, W. M.; all of said lands being located in Lewis County of the State of Washington,

also acquisition of right of ways for relocation of those portions of state, county and private roads and *highways*, and telephone and power lines *inundated by storage water impounded behind said dams;* acquisition of right of ways for such spur railroad tracks or access roads as may be required to be extended from the closest feasible point on available railroads or public highways to a point at or near said dam sites; *acquisition of such fish hatchery sites and water rights as may be required by the Federal Power Commission; . . .*" (Italics mine.)

From this legal description (contained in the original complaint) of the lands to be taken, damaged, or inundated by the reservoirs and storage basin sites, which included state lands devoted to public uses, respondents were charged with notice of the nature and extent of appellant's proposed condemnation proceedings.

Respondents state in their brief that:

"... Also there is no reference in the remotest sense in the city's original complaint that any state land either previously dedicated to public use, or not, is to be taken..." I cannot agree with this statement. Under the allegations of the original complaint, respondents were as well able in 1952 to ascertain the nature and ownership of the land sought to be damaged or to be taken by appellant as they were in 1955, when they first asserted this contention in the instant case in their answer and affirmative defense.

Respondents could have and should have raised, by demurrer or otherwise, when this case was first instituted, the question as to the power of appellant to condemn state lands devoted to a public use. Not having dong so, respondents should be precluded from litigating that question in the present case. A pertinent application of the law of the case doctrine is found in the case of *Smith* v. *Seattle*, 20 Wash. 613, 56 Pac. 389, and the following portion of that decision is directly in point:

"Respondent urges as a preliminary consideration, that the complaint does not state a cause of action, but we think it cannot be permitted to urge the point. This cause was here on a former appeal by the plaintiff from an order of the lower court which sustained a general demurrer to the complaint. (See *Smith* v. *Seattle*, 18 Wash. 484, 51 Pac. 1057 63 Am. St. Rep. 910, for a full statement of the case.) That order was reversed, this court concluding that the complaint was sufficient. It is true that the ground upon which the respondent now seeks to attack the complaint was not presented on the former appeal, and, inasmuch as the point was not presented nor passed upon at that time, counsel for the city insist that they have a right to urge it now. While it is true that the point was not raised on the former appeal, it is patent that it might have been, and we think it would be a bad and unwarranted practice to permit the point to be urged now. In support of its general demurrrer, respondent was entitled to urge the insufficiency of the complaint from any standpoint, and must be held to have waived every point not presented at the former hearing. Any other practice would result in cases coming here piecemeal, delaying litigation, increasing the expense to parties litigant and burdening the court with unnecessary labor. It would be productive of much mischief and cannot be tolerated."

The rule is that questions which have been determined on a prior appeal, or which might have been determined had they been presented, will not be considered by the appellate court upon a second appeal of the same action. *Buob* v. *Feenaughty Machinery Co.*, 4 Wn. (2d) 276, 103

P. (2d) 325, and cases cited; *Gray* v. *Wikstrom Motors*, 18 Wn. (2d) 795, 140 P. (2d) 497.

It is also clear that the question of the plenary power of the legislature over municipal corporations was directly in issue in *Tacoma* v. *Taxpayers, supra*. Judge Hamley, in his dissenting opinion, made the same argument which the majority relies upon in the case at bar, as follows:

"The Federal government may not confer corporate powers upon local units of government, and the Federal power act does not purport to do so. The supersedure, if any, with respect to the exertion of police power, does not affect applicability of chapter 9 as an exercise of the other power named, for, in my view, the legislature would have intended the act to remain in force in the latter regard had the matter of supersedure been called to its attention.

"That the legislature may restrict the powers of municipalities, is beyond question. Cities are limited governmental arms of the state. *Russell* v. *Grandview*, 39 Wn. (2d) 551, 236 P. (2d) 1061. They may exercise only those powers which are granted to them in the state constitution or statutes. Except as limited by the constitution, legislative control over municipalities is therefore plenary. *State* v. *Aberdeen*, 34 Wash. 61, 74 Pac. 1022; *Wheeler School Dist.* v. *Hanlon*, 18 Wn. (2d) 37, 137 P. (2d) 1010. It follows that the legislature may enlarge or diminish powers already granted to such subordinate units of government. *State ex rel. Nat. Bank of Tacoma* v. *Tacoma*, 97 Wash. 190, 166 Pac. 66."

Cross-appellants and the state advance substantially the same arguments as respondents relative to the law of the case, and therefore, without further discussion of that point, it is my opinion that these parties are bound by that doctrine for the reasons above stated. The state's further contention that it was not then a party in *Tacoma* v. *Taxpayers, supra*, and therefore not bound by the law of the case, is untenable, for the reasons hereinafter stated on the question of *res judicata*.

Turning now to my second reason for dissenting, to wit, that cross-appellants and the state are bound by the doctrine of *res judicata*, I wish to refer to certain undisputed facts shown in the record.

Appellant pleaded in its reply that the decision of the court of appeals for the ninth circuit in *State of Washington Department of Game* v. *Federal Power Comm.*, *supra*, was a bar to the position now taken by cross-appellants and the state in this court.

In 1948, appellant filed its declaration of intention to construct the Cowlitz project and followed this with its application to the Federal Power Commission for a license under the Federal Power Act (16 U.S.C.A., §791 *et seq.*). As required by the act, notice was served upon the state, in response to which the attorney general filed a petition to intervene upon behalf of the departments of fish and game of the state of Washington. The petition alleged that the state of Washington was a sovereign state of the United States, and that the state of Washington department of game and state of Washington department of fisheries were each a department and subdivision thereof, charged with the duty of enforcing its laws, rules, and regulations relative to the conservation of food fish and game fish. The petition contained this allegation in paragraph nine:

"That the reservoirs which would be created by the proposed dams would inundate a valuable and irreplacable fish hatchery owned by the State of Washington, as well as much productive spawning areas."

In addition, there was a petition for intervention filed on behalf of Washington State Sportsmen's Council, Inc., a nonprofit corporation, in opposition to the granting of a license to appellant. This petition contained an allegation identical to that last above quoted. Appellant's answer to this petition admitted the allegation. Both petitions for intervention were allowed.

Upon the issues thus framed, hearings were thereafter held before a presiding examiner of the Federal power commission, which consumed twenty-four days. An assistant attorney general, designated by his superior for the purpose, participated in these hearings and vigorously opposed appellant's application for a license. The attorney for the Sportsmen's Council did likewise.

During the proceedings, the assistant attorney general called Robert Meigs, assistant chief of the fish management division for the Washington state department of game, to testify on behalf of interveners. His testimony was, in part, as follows:

"Q. Now, does the State of Washington Game Department have a hatchery on the Cowlitz watershed? A. Yes, we have what we refer to as the Mossyrock Hatchery, which is located a short distance from Mossyrock, Washington. [3348] Q. Is it within the area that would be inundated by these dams? A. According to information furnished us by Tacoma, the flood line from the Mayfield reservoir would extend some 400 feet past the hatchery and would flood it out. Mr. Mason: You mean 400 feet vertically or horizontally? The Witness: That I don't recall. I don't think vertically; horizontally."

Thus the proposed inundation of the Mossyrock hatchery, owned and operated by the state of Washington, was not only admitted in the pleadings but was proven by undisputed evidence. Furthermore, it is indisputable that the flooding of the state's hatchery was an obvious part of the comprehensive scheme of the development of the Cowlitz river, which appellant was asking the power commission to approve in granting the city the license for which it was applying.

At the conclusion of the hearings, the presiding examiner recommended against issuance of the license. Appellant filed exceptions, and the matter was argued orally by all parties before the commission.

Thereafter, the Federal power commission made findings of fact, rendered an opinion, and issued the license to appellant.

Interveners filed a petition for rehearing before the commission, which was denied January 24, 1952.

On March 12, 1952, the state departments of game and fisheries *et al.* filed, in the United States court of appeals for the ninth circuit, a petition for review of the orders of the Federal power commission. The printed record in that case comprises 4,392 pages. One of the principal points relied upon by petitioners for annulment of commission's order was stated in the petition for review, as follows:

"Finding No. 53 by the Commission is not supported by substantial evidence and is contrary to Section 9(b) and 27 of the Federal Power Act in that Applicant has not complied with the Water Code of the State of Washington as required by said sections."

After setting forth the pertinent findings of the commission, and following a discussion of *First Iowa Hydro-Electric Cooperative* v. *Federal Power Comm.*, 328 U. S. 152, 90 L. Ed. 1143, 66 S. Ct. 906, the court of appeals answered this contention as follows:

"The Commission in our case acted within the scope of its discretion in not requiring Tacoma to show compliance with the laws of the State of Washington regulating the construction of dams in Washington, because compliance with those laws would have prevented the development of the Cowlitz Project; and in the opinion of the Commission of the Cowlitz Project was 'best adapted to a comprehensive plan' for the development of a concededly navigable stream. The Federal Government's Constitutional authority to regulate commerce and navigation includes the 'power to control the erection of structures in navigable waters', *United States* v. *Appalachian Power Co.*, 1940, 311 U. S. 377, 405, 61 S. Ct. 291, 298, 85 L. Ed. 243. The Federal Government's power over navigable waters is superior to that of the state. *McCready* v. *Virginia*, 1876, 94 U. S. 391, 24 L. Ed. 248.

"The objectors further contend that Tacoma, as a creature of the State of Washington, cannot act in opposition to the policy of the State or in derogation of its laws.

"Again, we turn to the *First Iowa* case, *supra*. There, too, the applicant for a federal license was a creature of the state and the chief opposition came from the state itself. Yet, the Supreme Court permitted the applicant to act inconsistently with the declared policy of its creator and to prevail in obtaining a license.

"Consistent with the *First Iowa* case, *supra*, we conclude that the state laws cannot prevent the Federal Power Commission from issuing a license or bar the licensee from acting under the license to build a dam on a navigable stream, since the stream is under the dominion of the United States. However, we do not touch the question as to the legal capacity of the City of Tacoma to initiate and act under the license once it is granted. There may be limitations in the City Charter, for instance, as to indebtedness, bonding privileges. Questions of this nature may be required by the Commission as relevant to the practicability of the plan, but the Commission has no power to adjudicate them." *State of Washington Department of Game v. Federal Power Commission*, 207 F. (2d) 391.

In the last paragraph above quoted, the court of appeals clarified that there might be a question of municipal indebtedness limitation or some other related question involved, and cited the case of *Tacoma v. Taxpayers*, then pending in this court. (Not such question was raised at the first appeal or subsequently.)

The state laws which the court of appeals held were not bar to construction of the Cowlitz project were the same laws passed upon by this court in *Tacoma v. Taxpayers* [illegible], the Columbia river fish sanctuary act and the fisheries code.

The court of appeals declined to consider any of the findings of the commission which were attacked by the petitioners. The court found that those findings (including Nos. 53 and 59, quoted supra) were supported by substantial evidence

and declined to interfere with the commission's order granting the license to the city of Tacoma.

The petitioners' petition for certiorari to the United States supreme court was denied on April 5, 1954. *Washington Department of Game v. Federal Power Comm.*, 347 U. S. 936, 98 L. Ed. 1087, 74 S. Ct. 626.

Cross-appellants and the state now vigorously attempt to avoid the effect of the two prior appeals in this litigation. They state in their briefs:

". . . We will, however, limit our remarks to the state of the pleadings after August 8, 1950, since this was a date on which the court, in the proper exercise of its discretion, granted the City's request to file an amended complaint and also permitted the State of Washington to intervene *pro forma* to be added as a party defendant. At this point, with respect to the state of the pleadings, there was a fresh lawsuit, and we believe any discussion of prior pleadings would be immaterial. . . ." (Italics ours.)

The only purpose in filing appellant's amended complaint was to incorporate an allegation that appellant's case had been amended to grant appellant an extension of time within which to commence construction of the Cowlitz project, and to incorporate Ordinance No. 1438 and amendments of Ordinance No. 1438. There was no material change in the pleadings.

The real crux of the argument advanced seems to be that, by adding the "Secretary, State of Washington" as a party in the present case, it became a new and independent cause. This position cannot be sustained.

In *State v. Pacific Tel. & Tel. Co.*, 9 Wn. (2d) 11, 113 P. (2d) 542, the state of Washington attempted by original action to recover the statutory sales and use tax on goods purchased outside this state by defendant. In a previous case defendant had obtained a judgment permanently enjoining collection of such tax by the tax commissioner of the state of Wash-

ington. *(Pacific Tel. & Tel. Co. v. Hemingford*, 195 Wash. 53[illegible] S.Ct. (2d) 786.) On appeal, this court held that the tax was an unlawful burden on interstate commerce. The question presented in the second case was whether the first suit was *res judicata*, and this question depended upon whether or not the state of Washington was actually a party in the first suit, even though that suit had been maintained against the tax commissioners. The court stated:

"The general rule is that a judgment for or against the state or an officer or agency thereof in matters as to which such officer or agency is entitled to represent the state is litigation conclusive for or against the state."

After discussing the pertinent statutes, the court concluded that the tax commissioners were authorized to represent the state in collection of the use tax, and that the judgment in the prior action was *res judicata* as against the state in the second action.

In the case at bar, the director of fisheries and the director of game are charged with the duty of enforcing the rules and regulations of their respective departments relative to the conservation and preservation of food fish and of game fish. See RCW 75.08.080 and RCW 77.04.080.

Further powers and duties of the director of fisheries are as follows: He has authority to enter into agreements with the department of defense relative to coordinating and regulating the control of fishing in the waters of the state over which the department of defense has assumed control (RCW 75.08.025); the power to establish and maintain state fish hatcheries, rearing stations, eyeing stations, brood ponds, and other facilities as in his judgment may be necessary for the exercise of his powers (RCW 75.08.060); the authority to accept money from municipalities, or other governmental units, in settlement of any claim for damages to food fish resources, and he is by statute designated the agent of the state to accept and receive all such funds and deposit them with the state's treasurer (RCW 75.16.050).

The director of game has similar powers conferred upon him by statute (RCW 77.12.200, 77.12.210, 77.12.220).

Under authority of these statutes, I am of the opinion that the directors of fisheries and of game, as agents of the state, are vitally interested in the continued existence of the Mossyrock hatchery. Their interest therein is not personal, nor is it an interest different from that of the sovereign state. The departments of fisheries and of game are but limited subdivisions of the state itself. They do not exist as entities *sui juris*, as does, for example, the state power commission. Therefore, the Mossyrock hatchery, which is concededly owned by the state, is under the jurisdiction of the departments of fisheries and of game, but they exercise control over it merely as agents of the state.

The directors of fisheries and of game were, therefore, properly joined as parties to the proceedings herein, and, under the rule announced in *State v. Pacific Tel. & Tel. Co.*, supra, it was their duty to represent the state. I conclude that the litigation in this court, as well as in *State of Washington Department of Game v. Federal Power Comm.*, supra, has at all times been an action against the state.

There is another basis for my conclusion that the state has been represented at all times in this action. The attorney general designated certain of his assistants to represent the departments of fisheries and of game in this litigation, in accordance with the following pertinent statutes.

RCW 43.10.030, defining the powers and duties of the attorney general, provides that he shall:

"(1) Appear for and represent the state before the courts in all cases in which the state is interested;

"(2) Institute and prosecute all actions and proceedings in behalf of, or for the use of the state, which may be necessary in the execution of the duties of any state officer;

"(3) Defend all actions and proceedings against any state officer in his official capacity, in any of the courts of this state or the United States;

"(5) Consult with and advise the governor, members of the legislature and other state officers, and when requested, give written opinions upon all constitutional or legal questions relating to the duties of such officers; . . ."

Under RCW 43.10.040, it is further provided that:

"The attorney general shall also represent the state and all officials, departments, boards, commissions and agencies of the state in the courts, and before all administrative tribunals or bodies of any nature, in all legal or quasi-legal matters, hearings, or proceedings, and advise all officials, departments, boards, commissions, or agencies of the state in all matters involving legal or quasi-legal questions, except those declared by law to be the duty of the prosecuting attorney of any county."

Under the authority of these statutes, the state of Washington was represented by its attorney general, both before the commission and the court of appeals.

"The Attorney General for the State appointed a special assistant attorney general to represent all persons not otherwise represented whose views were in conflict with the State Departments of Game and Fisheries. Thus, the State of Washington by its Attorney General, and the people of Washington holding views not in harmony with the State's official position, and the applicant City of Tacoma were represented at the hearing which was had before an Examiner." *State of Washington Department of Game* v. *Federal Power Comm.*, 207 F. (2d) 391, 393.

He could and should have raised, before the Federal power commission and the court of appeals, the objection that appellant did not have statutory authority to condemn state lands devoted to public uses.

It is the purpose of the law that where issues have once been litigated and decided, the litigation shall then be at an end.

Where a party has had a full opportunity to present all the defenses at his command, and fails to do so, the doctrine of *res judicata* applies. *Symington* v. *Hudson*, 10 Wn. (2d) 331, 243 P. (2d) 484.

This doctrine was applied by the supreme court of the United States in *Commissioner of Internal Revenue* v. *Sunnen*, 333 U. S. 591, 92 L. Ed. 898, 68 S. Ct. 715, where it was said:

"It is first necessary to understand something of the recognized meaning and scope of *res judicata*, a doctrine judicial in origin. The general rule of *res judicata* applies to repetitions suits involving the same cause of action. It rests upon considerations of economy of judicial time and public policy favoring the establishment of certainty in legal relations. The rule provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound 'not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.' *Cromwell* v. *County of Sac*, 94 U. S. 351, 352. The judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever, absent fraud or some other factor invalidating the judgment. See Von Moschzisker, 'Res Judicata,' 38 Yale L. J. 299; Restatement of the Law of Judgments, §§ 47, 48."

The rule above stated is directly applicable in this case. In *State of Washington Department of Game* v. *Federal Power Comm.*, *supra*, the pleadings admitted, and the proof established, that the Mossyrock hatchery would be isolated and, of necessity, taken by second or other proceedings. The final judgment entered in that case is, therefore, binding upon cross appellants and the state as to the issue of condemnation, which they now contend is before this court for the first time.

Neither the entry of new counsel into the case [illegible] addition of a sovereign state as a party defendant after its

duly appointed representatives had lost the case, changes the character of the lawsuit. I am of the opinion that the decision of the court of appeals for the ninth circuit, in the case of *State of Washington Department of Game* v. *Federal Power Comm.*, *supra*, is *res judicata* as against both cross-appellants and the state.

Assuming *arguendo* that neither the doctrine of the law of the case nor the doctrine of *res judicata* applies to the facts before us, then my third reason for dissenting is that the majority has misconstrued the Federal power act and has failed to give it the supremacy over state laws which should be accorded it under the commerce clause of the United States constitution.

I am entirely in agreement with the majority in its statement of the general rule that a municipality is a creature of the legislature, and that its powers (including that of eminent domain) are derived from the legislature or the constitution. It has no power of eminent domain except as granted by the legislature. But, in this case (as stated on the first appeal), the power of Congress, under the commerce clause, is superior to that of the state when Congress exercises its power as it did in enacting the Federal power act.

The two principal decisions of the United States supreme court construing the power act and its supremacy under the commerce clause were discussed in this court's opinion on the first appeal. They are *United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377, 85 L. Ed. 243, 61 S. Ct. 291, and *First Iowa Hydro-Electric Cooperative* v. *Federal Power Comm.*, 328 U. S. 152, 90 L. Ed. 1143, 66 S. Ct. 906. These two decisions will herein be referred to as the *Appalachian* case and the *First Iowa* case, respectively.

Bearing in mind the holding in these two cases that Congress has plenary power over navigable waters, and

that it may deny, or grant, on such terms as it sees fit, the privilege of constructing dams therein, I wish to invite attention to certain provisions of the Federal power act (41 Stat. 1063).

In § 4(e) (16 U.S.C.A. § 797), the Federal power commission (herein referred to as the commission) was authorized to issue licenses for the construction of dams and appurtenances to certain entities, including "any state or municipality." In the preceding § 3, Congress defined the term "municipality" as follows:

" 'municipality' means a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power; . . ."

Under § 6 (16 U.S.C.A. § 799), the commission may issue such licenses for a period not exceeding fifty years which may be conditioned upon the acceptance by the licensee of certain terms and conditions stated in the act and of any others that may be prescribed by the commission pursuant thereto.

Section 9 (16 U.S.C.A. § 802) provides:

"Each applicant for a license under this chapter shall submit to the commission—

"(a) Such maps, plans, specifications, and estimates of cost as may be required for a full understanding of the proposed project. Such maps, plans, and specifications when approved by the commission shall be made a part of the license; and thereafter no change shall be made in said maps, plans, or specifications until such changes shall have been approved and made a part of such license by the commission.

"(b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation,

diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this chapter.

"(c) Such additional information as the commission may require."

Section 10 (16 U.S.C.A. § 803) prescribes certain conditions on which all licenses shall be issued. Subdivision (a) thereof reads as follows:

"That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water power development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval."

By § 14 (16 U.S.C.A. § 807), the United States is granted an option to purchase any project upon or after the expiration of the license upon payment of the net investment of the licensee if the purchase price be not mutually agreed upon by the parties. The term "net investment" is defined in § 3 of the act (16 U.S.C.A. § 796).

Licensees are granted the power of eminent domain in § 21 (16 U.S.C.A. § 814) in the following language:

"When any licensee cannot acquire by contract or pledges an unimproved dam site or the right to use or damage the lands or property of others necessary to the construction, maintenance, or operation of any dam, reservoir, diversion structure, or the works appurtenant or accessory thereto, in conjunction with an improvement which in the judgment of the commission is desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use

or benefit of interstate or foreign commerce, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such land or other property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided*, That United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000."

Without further reviewing the provisions of the Federal power act, it is apparent that Congress intended to and did exercise its full power under the commerce clause in providing for the licensing of the projects described therein. When the power commission has made a finding as required by § 9(b) that the licensee has complied with state laws with respect to the right to engage in the business of developing, transmitting, and distributing electric power and any other business necessary to effect the purposes of the licensee under the act, then the licensee becomes the agent of the Federal government in regard to the project. Upon the issuance of the license, all rights and obligations of the licensee are derived from congressional, constitutional powers, and not those of the state where the project is located. See *First Iowa* case.

The project for which the license is issued is a Federal project and is to be considered as if it were to be constructed and operated by the government itself. The government has an option to buy the project works at the end of the license period, as provided in § 14 of the act. Every detail of the project must be carried out by the licensee in strict accordance with the terms of the license and the maps and drawings identified therein. The comprehensive plan adopted by the power commission for the

development of the waterway may not be deviated from by a licensee without permission of the commission.

The licensee derives the power of eminent domain from § 21 of the act (quoted above). Long before the passage of the act, Congress, in 1906 (34 Stat. 462), enacted a special act authorizing the city of St. Louis to construct a bridge across the Mississippi river in accordance with the general bridge act. With respect to the exercise of the power of eminent domain, § 2 of the special act provided:

"That for the purpose of carrying into effect the objects of this Act, the city of Saint Louis may receive, purchase, and also acquire by lawful appropriation and condemnation in the States of Illinois and Missouri, upon making proper compensation, to be ascertained according to the laws of the State within which the same is located, real and personal property and rights of property, and may make any and every use of the same necessary and proper for the construction, maintenance, and operation of said bridge and approaches consistent with the laws of the United States and of the said States respectively."

The authority of St. Louis to condemn lands for bridge approaches in Illinois was challenged. In *Latinette* v. *St. Louis*, 201 Fed. 676, the circuit court of appeals (7th cir.) disposed of this challenge by saying:

"Only consent was given by section 1 of this latter act to build the bridge in the manner and on the conditions expressed in the general bridge statute. Authority to exercise the sovereign power of appropriation, if given at all, was conferred in section 2. Appellant's contention is that the words 'according to the laws of the state' show that Congress meant that St. Louis should not have power to condemn except by virtue of state law, and that, inasmuch as Illinois refuses to give St. Louis the power, the judgment must be reversed. But, looking to the construction of the sentence, it seems clear to us that only the 'compensation' is 'to be ascertained according to the laws of the state.' Furthermore, while Congress might tell its agent to go to the state law for the rules of practice,

it could not constitutionally effect anything by telling its agent to go to the state law for power to condemn land for a national purpose. Condemnation is an attribute of sovereignty. It must be exercised directly by the sovereign or through an agency appointed by the sovereign. Neither the power nor the selection of agents can be transferred to another. States have the power only for state purposes; the nation, only for national purposes. *So, the power to condemn mentioned in section 2 must be referred to the national power.* And finally, Congress in framing section 2 used a formula of expression which had already been judicially construed. In *Luxton* v. *North River Bridge Co.*, 153 U. S. 525, 14 Sup. Ct. 891, 38 L. Ed. 808, the act provided that the bridge company might 'acquire by lawful appropriation and condemnation, upon making proper compensation therefor, to be ascertained according to the laws of the state within which the same is located, real and personal property and rights of property'; and these words, the same as in the case at bar, were held to relate to the national power.

"Contention is therefore narrowed to this: That Congress could not constitutionally select appellee as the agency through which a national power should be exercised. Nothing in the Constitution forbids the selection of a state corporation as a national agent. In reason the material thing is the principal's authority, not the parentage or birthplace of the agent. And the decisions of Mr. Justice Bradley at circuit in *Stockton* v. *B. & N. Rld. Co.*, (C. C.) 32 Fed. 9, and of the Supreme Court in *Cherokee Nation* v. *Kansas Ry. Co.*, 135 U. S. 641, 10 Sup. Ct. 965, 34 L. Ed. 295, explicitly cover the point." (Italics mine.)

Another case which does involve the right of a licensee under the act to exercise the power of eminent domain is *State of Missouri ex rel. Camden County* v. *Union Electric Light & Power Co.*, 42 F. (2d) 692. There, a private utility corporation had received a license from the power commission to build a dam for the purpose of producing hydro-electric power. The plan contemplated a dam which

". . . would inevitably create an immense reservoir and cause the inundation of vast tracts and bodies of land, the submergence of many public highways and school districts, and the permanent overflow of the village of Linn Creek in Camden county, which is now the county seat of said county; and that the courthouse and other public property situated in said Linn Creek would be flooded and rendered useless."

The state of Missouri and Camden county brought an action in the United States district court to enjoin the construction of the proposed dam. After discussing the power of Congress under the commerce clause and the effect of the Federal water power act of 1920 (prior to the 1935 amendment), the court considered § 21, relating to the power of eminent domain as it related to property already devoted to a public use. After quoting § 21, the court said:

"The licensee has been granted the power to acquire property by the exercise of eminent domain in express terms. Concededly this right may be exercised as against private property.

" 'Public lands,' as used in the act, refers only to lands owned by the United States. The only question, therefore, that is here presented is whether the right of eminent domain may be exercised against property already dedicated to a public use when situated within the proposed reservoir and to be affected by the improvement.

"While it is well settled that the Legislature may authorize the taking of property already devoted to a public use, it is equally well established that a general delegation of the power of eminent domain does not authorize the taking of property already devoted to a public use, '*unless it can clearly be inferred from the nature of the improvements authorized or from the impracticability of constructing them without encroaching upon such property that the legislature intended to authorize such a taking.*' 10 R. C. L. § 169; Western Union Telegraph Co. v. Pennsylvania R. R. Co. *et al.*, 195 U. S. 540, 25 S. Ct. 133, 49 L. Ed. 312, 1 Ann. Cas. 517. In this

connection it cannot be questioned but that the Congress had the power to confer the right of eminent domain upon the defendant Union Electric Light & Power Company, 10 R. C. L. § 167.

"In the instant case the Congress must have contemplated this identical situation; hence the requirement of notice. Moreover, the proposed improvements could not be accomplished, except through the exercise, if necessary, of eminent domain against property already dedicated to public use. *To deny the right of eminent domain as against this public property would not only defeat the functions of the national government, but would run contrary to the obvious intent of the Congress as expressed in the Water Power Act.* Stockton, Attorney General, v. Baltimore & New York R. R. Co., (C. C.) 32 F. 9; 20 C. J. § 90, P. 602; Vermont. Hydro-Electric Corporation v. Dunn et al., 95 Vt. 144, 112 A. 223, 12 A. L. R. 1495; Imperial Irrigation Co. v. Jayne, 104 Tex. 395, 138 S. W. 575, Ann. Cas. 1914B, 322.

"It is not within the judicial power to question the purpose for which property is to be taken under the power of eminent domain. The necessity for the taking is not a judicial question, but is exclusively within the power of Congress and one which it may determine by direct enactment or by delegating the power to some officer or board. Kaw Valley Drainage District of Wyandotte County, Kansas, et al. v. Metropolitan Water Co., (C. C. A.) 186 F. 315." (Last italics mine.)

The state's prayer for an injunction to prevent the flooding of the public property within the proposed reservoir was denied.

The majority opinion holds that the state of Washington may now, at this late date, appear in this declaratory judgment action and obtain a declaration that appellant may not condemn the right to flood the Mossyrock hatchery because the legislature has not authorized such a proceeding.

In my opinion, the assertion comes too late, because the power commission, in a proceeding before it (to which the

state was a party), found (finding No. 53) that appellant had authority under state law to do everything necessary to carry out the provisions of the license granted it. The record showed that the acquisition of the right to flood this state-owned hatchery was an essential part of the comprehensive plan for the development of the Cowlitz river, which the power commission had approved and for which the license was issued to appellant. As previously stated, the state's challenge of this finding was overruled by the court of appeals for the ninth circuit (207 F. (2d) 391). To uphold the state's contention in the present case, is to overrule the decision of a Federal court in a matter over which it had jurisdiction. It seems to me that considerations of comity forbid our doing so.

But the most serious error in the majority opinion (as I see it) is the disregard of the constitutional separation of state and Federal powers as recognized by the supreme court's decisions in the *Appalachian* and *First Iowa* cases. It would extend this opinion beyond all permissible limits to review those decisions in detail. The supreme court plainly held that the power commission had sole jurisdiction to determine whether a licensee had authority under state laws to carry out the terms of its license.

This holding is emphasized by the dissenting opinion of Justice Frankfurter, who did not disagree with the court's interpretation of the Federal power act nor the constitutional power of Congress to enact it. He felt that under § 9(b) the power commission should not make a finding regarding state laws until the state courts had interpreted them. This is clear from the following portion of his dissenting opinion:

"By § 9(b) of the Act, 41 Stat. 1063, 1068; 16 U. S. C. § 802(b), Congress explicitly required that before the Commission can issue a license for the construction of a hydroelectric development, such as the proposed project of the petitioner, the Commission must have 'satisfactory

evidence that the applicant has complied with the requirements of the laws of the State' in reference to the matters enumerated.

"Whether the Commission has such 'satisfactory evidence' necessarily depends upon what the requirements of State law are. In turn, what the requirements of State law are often depends upon the appropriate but unsettled construction of State law. And so, the Commission may well be confronted, as it was in this case, with the necessity of determining what the State law requires before it can determine whether the applicant has satisfied it, and therefore, whether the condition for exercising the Commission's power has been fulfilled.

"To safeguard the interests of the States thus protected by § 9(b), Congress has directed that notice be given to the State when an application has been filed for a license, the granting of which may especially affect a State. Section 4(f), 49 Stat. 838, 841; 16 U.S.C. § 797(f). *If a State does not challenge the claim of an applicant, the evidence submitted by the applicant, if found to be satisfactory by the Commission, has met the demands of § 9(b), and a State cannot thereafter challenge the Commission's determination.*" (Italics mine.)

The majority of that court in the *First Iowa* case did not indicate any disagreement with the italicized portion of the dissent quoted. The majority were of the view that the commission could make findings under § 9(b) in the absence of state court decisions interpreting state statutes. We are, of course, bound by the majority decision.

To hold otherwise is to permit the state of Washington to exercise a veto as to the project involved in the case before us by saying that the power commission was wrong in finding that the city of Tacoma had authority under state law to construct these dams, because the city has no authority to condemn the right to flood the state's fish hatchery. Under the decision in the *First Iowa* case, the power commission has exclusive jurisdiction to make a finding whether a licensee has authority under state law

to engage in the power business. (§ 9(b)). The power commission has made that finding (the circuit court refused to set aside the finding), so that factual issue was permanently and effectively settled.

The Federal power act in § 21 affords a licensee ample authority as an agent of the Federal government to exercise the power of eminent domain without state authority. A state may not deny or impair this authority once a license has been issued.

The majority opinion concludes with the following statement of its decision on the constitutional question presented:

"In the instant case, the subject matter—the inherent inability of the city to condemn state lands dedicated to a public use—does not present a question of *state statutory prohibition;* it presents a question of *lack of state statutory power* in the city. It does not present a Federal question; it presents a question peculiarly within the jurisdiction of the state of Washington.

"The Federal government may not confer corporate capacity upon local units of government beyond the capacity given them by their creator, and the Federal power act, as we read it, does not purport to do so.

"If it be held that the Federal government may endow a state-created municipality with powers greater than those given it by its creator, the state legislature, a momentous and novel theory of constitutional government has been evolved that will eventually relegate a sovereign state to a position of impotence never contemplated by the framers of our constitutions, state and Federal."

However much I might agree with the majority's statement in the last paragraph above quoted as to the effect of such a holding on the powers of a sovereign state, several decisions of the United States supreme court rendered in the past twenty-five years construing the commerce clause (in addition to the *Appalachian* and *First Iowa* cases) compel my dissent from the majority holding as stated in the first two paragraphs of the quotation.

An excellent discussion of these decisions is found in the January, 1957, issue of the American Bar Association Journal (Vol. 43, p. 55) under the subheading "The Commerce Clause—Then and Now." Among the decisions cited therein are: *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 81 L. Ed. 893, 57 S. Ct. 615, 108 A. L. R. 1352 (upholding the validity of the Wagner Act under the commerce clause); *United States* v. *Darby*, 312 U. S. 100, 85 L. Ed. 609, 61 S. Ct. 451, 132 A. L. R. 1430 (upholding the validity of the fair labor standards act under the commerce clause); *United States* v. *South-Eastern Underwriters Ass'n*, 322 U. S. 533, 88 L. Ed. 1440, 64 S. Ct. 1162 (holding that the insurance business may be regulated by Congress under the commerce clause).

Other examples of acts of Congress, based upon the commerce clause and having a similar effect upon the powers of the states, which have been held valid by the Federal courts are: Securities act of 1933, declared constitutional in *Jones* v. *Securities & Exchange Comm.*, 298 U. S. 1, 80 L. Ed. 1015, 56 S. Ct. 654; Securities exchange act of 1934, declared constitutional in *Wright* v. *Securities & Exchange Comm.*, 112 F. (2d) 89 (C.C.A. 1940).

Whatever views one may entertain regarding the effect of these decisions upon powers of the sovereign states, the supreme court remains the final authority on the constitutionality and interpretation of these acts of Congress as well as of the Federal power act. Under Art. VI of the United States constitution, the laws of the United States made in pursuance thereof are declared to be the supreme law of the land, binding on state judges regardless of any state laws or constitutional provisions to the contrary.

Therefore, deeming myself bound by the decisions of the supreme court in the *Appalachian* and *First Iowa* cases, interpreting the Federal power act, I am impelled to dissent from the opinion of the majority in this case.

Without further extending my views, I deem it sufficient to state that, in my opinion, appellant's amended complaint states a cause of action, and that the several answers and cross-complaints herein have not raised a valid defense, for the reasons heretofore given.

My conclusion is that appellant has a valid license issued by the Federal power commission for construction of the Cowlitz project, and that the utility bonds authorized by ordinance No. 14386, as amended, have not been shown to be invalid in any respect.

I would dispose of this case as follows:

The portion of the judgment from which the cross-appeal is taken should be affirmed. On appellant's appeal, the judgment of the trial court should be set aside, and the cause remanded to the superior court with directions to enter a declaratory judgment for appellant in conformity with the views expressed herein. The injunction *pendente lite*, heretofore continued in effect by order of this court, should be dissolved.

MALLERY and FINLEY, JJ., concur with DONWORTH, J.

APPENDIX B

(No. 32411. *En Banc.* October 14, 1953.)

THE CITY OF TACOMA, *Appellant*, v. THE TAXPAYERS OF TACOMA, *Respondents*, ROBERT SCHOETTLER, *as State Director of Fisheries, et al., Respondents and Cross-appellants.*[1]

Cross-appeals from a judgment of the superior court for Thurston county, No. 26572, Wright, J., entered December 15, 1952, sustaining a demurrer to the complaint, dismissing an action to determine a city's right to issue and sell certain utility bonds. Reversed on plaintiff's appeal; cross-appeal dismissed.

Clarence M. Boyle, J. D. Barline, and *E. K. Murray*, for appellant.

Copeland & Tollefson, for respondents.

The Attorney General and *Lee Olwell, Harold A. Pebbles*, and *William E. Hicks, Special Assistants, for* respondents and cross-appellants.

DONWORTH, J.—This action was instituted by the city of Tacoma against the taxpayers of Tacoma and the directors of game and fisheries of the state of Washington, under the provisions of RCW 7.24.010 *et seq.* [*cf.* Rem. Rev. Stat. (Sup.), § 784-1, *et seq.*], relating to declaratory judgments, and RCW 7.24.150 *et seq.* [*cf.* Rem. Rev. Stat. (Sup.), § 5616-11 *et seq.*] providing for testing and determining the validity of a proposed bond issue.

The purpose of the suit was to determine plaintiff's right to issue and sell certain utility bonds to finance the construction of two power dams on the Cowlitz river in Lewis county, Washington, as provided by its ordinance No. 14386, and particularly to determine whether chapter 9, Laws of 1949, p. 38 [*cf.* RCW 75.20.010 *et seq.*], or §§ 46 and 49, pp. 272, 274, chapter 112, Laws of 1949 [*cf.* RCW 75.20.050 and 75.20.100], or any other law of the state of Washington is

[1] Reported in 262 P. (2d) 214.

a bar to such construction and to the issuance and sale of the bonds.

Pursuant to the provisions of RCW 7.24.150, the superior court for Pierce county appointed certain citizens and taxpayers to represent all taxpayers of the city of Tacoma as defendants in the suit. The defendant taxpayers demurred to the complaint. The directors of game and fisheries filed an amended answer and cross-complaint, denying the material allegations of the complaint, and by way of affirmative defense and cross-complaint alleged that the contemplated dam construction was illegal under state law. The directors prayed that ordinance No. 14386 of the city of Tacoma be adjudged unlawful and that plaintiff be perpetually enjoined from constructing the dams. Plaintiff demurred to the amended answer and cross-complaint.

By stipulation of the parties and order of the superior court for Pierce county, the venue of the case was transferred to the superior court of Thurston county. That court heard arguments and sustained the taxpayers' demurrer to the complaint on the ground that it failed to state a cause of action and stated in its order of dismissal that this ruling substantially disposed of the entire matter and made it unnecessary to consider plaintiff's demurrer to the cross-complaint. Upon plaintiff's election to stand on its complaint, the court dismissed the action with prejudice.

Plaintiff has appealed from the judgment of dismissal. Defendant directors have cross-appealed from the court's refusal to enter an order overruling plaintiff's demurrer to their amended cross-complaint and its refusal to enter findings of fact, conclusions of law, and judgment against plaintiff.

For purposes of this appeal, the city of Tacoma will be referred to as appellant, the taxpayers of Tacoma will be referred to as respondents, and the directors of game and fisheries as cross-appellants.

The facts alleged in appellant's complaint which are necessary to an understanding of this controversy are these:

On August 6, 1948, appellant filed with the Federal power commission its declaration of intention to construct two power dams on the Cowlitz river in the state of Washington, pursuant to § 23 (b) of the Federal power act (16 U. S. C. A. § 817).

Thereafter, on December 28, 1948, it filed with the power commission an application for a Federal license to construct these dams (project No. 2016). The smaller dam, as proposed, is to be located at mile 52 on the Cowlitz river, about a mile southeast of the town of Mayfield. It is to be approximately 185 feet in height above tailwater, have a storage capacity of approximately 127,000 acre feet, and have a powerhouse with an installed capacity of 120,000 kilowatts in three units.

The larger dam, as proposed, is to be constructed at mile 65 on the same river, approximately two and one-half miles east of the town of Mossyrock. This dam is to be approximately 325 feet above tailwater, have a storage reservoir with a capacity of approximately 1,375,000 acre feet and a powerhouse with an installed capacity of 225,000 kilowatts in three units. Provisions were made for expansion of the kilowatt output on each plant if necessary.

On March 8, 1949, the power commission made the following preliminary findings:

"(1) Construction and operation of the project proposed by the declarant would affect public lands or reservations of the United States.

"(2) Boats have navigated the Cowlitz River to Toledo and during high water stages boats have navigated the river for some distance above Toledo.

"(3) The United States has improved the Cowlitz River by snagging, dredging and regulating works from its mouth to Toledo to obtain a minimum navigable depth of 2½ feet.

"(4) The Cowlitz River from its point of junction with the Columbia River to at least Toledo is a navigable water of the United States and may be a navigable water of the United States for some distance upstream from Toledo.

"(5) Either or both of the proposed reservoirs would have sufficient usable storage capacity to enable either or both of them to be operated in such a manner as to materially affect the water stage in the Cowlitz River at Toledo or below, which section of the river we have found to be a navigable water of the United States, and thus the construction of either or both of the proposed reservoirs would materially affect the navigable capacity of the Cowlitz River.

"(6) The interests of interstate or foreign commerce would be affected by the construction and operation of either or both of the reservoirs proposed by the declarant."

These findings were followed by an order requiring appellant to secure a license under the provisions of the Federal power act before commencing construction of either of the proposed dams.

The power commission thereafter conducted extended hearings on appellant's application for a Federal license, at which hearings the departments of fisheries and of game of the state of Washington participated as interveners, along with other interested groups.

Under date of November 28, 1951, the power commission issued its opinion (No. 221) and order issuing the license to appellant. The order recited sixty-six findings of fact and then stated:

"The Commission orders:

"(A) This license is issued to the City of Tacoma, Washington, under Section 4 (e) of the Act for a period of 50 years, effective as of the first day of the month in which the accepted license is filed with the Commission by the Licensee, for the construction, operation and maintenance of Project No. 2016 upon the Cowlitz River, a stream over which Congress has jurisdiction, and upon lands of the

United States, subject to the terms and conditions of the Act which is incorporated by reference as a part of this license, and subject to such rules and regulations as the Commission has issued or prescribed under the provisions of the Act.

"(B) This license is also subject to the terms and conditions set forth in Form L-6 entitled 'Terms and Conditions of License for Unconstructed Major Project Affecting Navigable Waters and Lands of the United States,' which terms and conditions are attached hereto and made a part hereof; and subject to the following special conditions set forth herein as additional articles:

[Here follow Articles 28 to 35, inclusive.]

"(C) The exhibits specified in paragraph (63) above are approved as part of this license.

"(D) This order shall become final 30 days from the date of its issuance unless application for rehearing shall be filed within the 30-day period provided by Section 313 (a) of the Act.

"(E) This license shall be accepted and returned to the Commission within 60 days from date of issuance of this order."

Appellant by authority of its city council formally accepted all the provisions, terms, and conditions of this license on December 28, 1951.

On December 26, 1951, the departments of fisheries and of game and the Washington State Sportsmen's Council, Inc., filed an application for rehearing. This application was denied by the power commission on January 22, 1952, in an order stating in part:

"The Interveners appear to be under the impression that the Commission failed to consider the proposed Cowlitz Project in relation to the Columbia Basin as a whole. As shown by the numerous specific findings in the opinion and order issued November 28, 1951, the Commission considered and analyzed the evidence as related specifically to the Cowlitz Project alone and as related to the comprehensive

development of the entire Columbia River Basin. It was only after the Commission had examined all the plans in evidence relating to the comprehensive development of the Pacific Northwest Region that it reached the conclusion that the Cowlitz Project was best adapted to a comprehensive plan for developing the Columbia River watershed for the use and benefit of interstate commerce and the other beneficial public uses."

On January 9, 1952, appellant's city council duly enacted ordinance No. 14386 (which became effective January 20, 1952), in which it adopted the plan and system therein described and designated as the Cowlitz power development as an addition to, and an extension of, its existing facilities for the generation and distribution of electric energy. This ordinance authorized the construction of the Mossyrock and Mayfield dams and, to provide the necessary additional funds, authorized the issuance and sale of utility revenue bonds, from time to time, not exceeding the total principal amount of $146,000,000. There was included in the ordinance the following:

"The construction of this project has been licensed by the Federal Power Commission under Project No. 2016, and the construction herein authorized shall conform with the requirements of such license.

"Section 3. That the entire improvement consisting of the additions and betterments to and extensions of the said existing electric generating plant and system shall be known and designated as Cowlitz Power Development. That the total estimated cost of said Development declared as near as may be is the sum of $146,000,000.00."

Appellant's complaint, containing the allegations which we have summarized above, was verified February 6, 1952.

The cross-appellants state in their brief that a petition for review of the orders of the power commission involved in this case has been filed by them in the circuit court of appeals for the ninth circuit (being cause No. 13289), and that the matter is now pending in that court. Consequently, the license issued to appellant is still in litigation and has

not become effective. Nevertheless, the present case has been submitted by the parties to this court and we deem it proper to decide it on the record presented to us.

[Subsequent to the preparation of this opinion, the circuit court of appeals on October 5, 1953, rendered its decision declining to interfere with the power commission's order. See *Washington Department of Game* v. *Federal Power Comm.*, 207 F. (2d) 391.]

The first question to be considered is whether appellant's complaint states a cause of action. On this appeal, the demurrer admits all facts well pleaded and reasonable inferences to be drawn therefrom. *Slater* v. *Bird*, 40 Wn. (2d) 848, 246 P. (2d) 460, and cases cited.

Thus it is admitted that the power commission found that appellant's proposed project will affect the navigability of at least part of the Cowlitz river, which it has determined to be a navigable water of the United States; that it will affect the interests of interstate commerce; that it will affect public lands or reservations of the United States, and that, therefore, the project is thus within the jurisdiction of the Federal power commission under the Federal power act. It is further admitted that the power commission has rendered its opinion No. 221 and has issued its license in the form attached to the complaint as exhibit "D".

The question presented is whether appellant, having complied with all applicable Federal laws and possessing a license issued by the Federal power commission, is barred from constructing the project because of certain laws of the state of Washington relating to the protection of fish.

The two acts principally relied upon by respondents and cross-appellants as barring appellant's construction of this project were enacted in 1949. They are:

(1) The Columbia river fish sanctuary act (Chapter 9, Laws of 1949).

This act is entitled:

"AN ACT relating to the protection of anadromous fish life in the rivers and streams tributary to the lower Columbia River and declaring an emergency."

Section 1 of the act [*cf.* RCW 75.20.010] reads:

"All streams and rivers tributary to the Columbia River downstream from McNary Dam are hereby reserved as an anadromous fish sanctuary against undue industrial encroachment for the preservation and development of the food and game fish resources of said river system and to that end there shall not be constructed thereon any dam of a height greater than twenty-five (25) feet that may be located within the migration range of any anadromous fish as jointly determined by the Director of Fisheries and the Director of Game, nor shall waters of the Cowlitz River or its tributaries or of the other streams within the sanctuary area be diverted for any purpose other than fisheries in such quantities that will reduce the respective stream flows below the annual average low flow, as delineated in existing or future United States Geological Survey reports: *Provided*, That when the flow of any of the streams referred to in this section is below the annual average, as delineated in existing or future United States Geological Survey reports, water may be diverted for use, subject to legal appropriation, upon the concurrent order of the Director of Fisheries and Director of Game."

Section 2 requires cross-appellants to acquire and abate any dam on any stream which may be in conflict with § 1. Section 3 exempts dams on two named rivers, and § 4 declares an emergency.

(2) Chapter 112, Laws of 1949, known as the Fisheries code of the state of Washington.

Section 46 thereof [*cf.* RCW 75.20.050] provides:

"It is hereby declared to be the policy of this state that a flow of water sufficient to support game fish and food fish

populations be maintained at all times in the streams of this state.

"The Supervisor of Hydraulics shall give the Director of Fisheries and the Director of Game notice of each application for a permit to divert water, or other hydraulic permit of any nature, and the Director of Fisheries and Director of Game shall have thirty (30) days after receiving said notice in which to state their objections to the application, and the permit shall not be issued until the thirty (30) days period provided for herein has elapsed.

"The Supervisor of Hydraulics may refuse to issue any permit to divert water, or any hydraulic permit of any nature, if, in the opinion of the Director of Fisheries or Director of Game, such a permit might result in lowering the flow of water in any stream below the flow necessary to adequately support food fish and game fish populations in the stream.

"The provisions of this section shall in no way affect existing water rights."

Section 49 thereof [*cf.* RCW 75.20.100] provides:

"In the event that any person or government agency desires to construct any form of hydraulic project or other project that will use, divert, obstruct or change the natural flow or bed of any river or stream or that will utilize any of the waters of the state or materials from the stream beds, such person or government agency shall submit to the Department of Fisheries and the Department of Game full plans and specifications of the proposed construction or work complete plans and specifications for the proper protection of fish life in connection therewith, the approximate date when such construction or work is to commence and shall secure the written approval of the Director of Fisheries and the Director of Game as to the adequacy of the means outlined for the protection of fishlife in connection therewith and as to the propriety of the proposed construction or work and time thereof in relation to fish life, before commencing construction or work thereon. If any person or government agency shall commence construction on any such works or projects without first providing plans and specifications subject to the approval of the Director of Fisheries and the Director of Game for the proper pro-

tection of fish life in connection therewith and without first having obtained written approval of the Director of Fisheries and the Director of Game as to the adequacy of such plans and specifications submitted for the protection of fish life, he shall be guilty of a gross misdemeanor. If any such person or government agency be convicted of violating any of the provisions of this act and continues construction on any such works or projects without fully complying with the provisions of this act, such works or projects are hereby declared a public nuisance and shall be subject to abatement as such. . . . "

Respondents and cross-appellants contend that these statutes are a valid exercise of the police power of the state to preserve its fishery resources for the common welfare of its citizens and must be complied with before appellant can proceed with the construction of its project.

In order to pass upon the validity of these state laws, it is necessary to review in some detail the provisions and constitutional background of the Federal water power act.

In 1920, Congress passed that act, which created the Federal power commission, with authority to license projects to develop the navigable waters of the United States. This was a major undertaking and was the outgrowth of a widely supported effort of the conservationists to secure enactment of a comprehensive plan of national regulation which would promote the integrated development of the water resources of the nation, to the extent that it was within the Federal power to do so. *First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission*, 328 U.S. 152, 90 L. Ed. 1143, 66 S. Ct. 906 (which is the leading case on this subject to which extended reference will be made later).

The Federal water power act of 1920, as amended, was incorporated into the Federal power act in 1935. (16 U. S. C. A. §§ 791a-823.) The sections of the act which are particularly pertinent to the present controversy are set forth below.

Section 3 of the act (16 U. S. C. A. § 796) defines certain words, including "licensee," "municipality," "navigable waters," and "municipal purposes," which have a bearing upon our present problem.

Section 4 (16 U. S. C. A. § 797), defining the commission's authority and powers, provides in subsection (e):

"(e) To issue licenses to citizens of the United States or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: . . ."

Section 9 (16 U. S. C. A. § 802), prescribing information to be furnished the power commission by the applicant, includes in subsection (b) the following:

"(b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this chapter."

Section 10 (16 U. S. C. A. § 803) provides the conditions upon which a license shall be issued by the power commission. Subsection (a) provides:

"(a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the

Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of waterpower development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval."

Section 23(b) (16 U. S. C. A. § 817) so far as is pertinent reads:

". . . Any person, association, corporation, State, or municipality intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined in this chapter as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, State, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this chapter. . . ."

Section 27 (16 U. S. C. A. § 821) contains the following provisions:

"Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein."

The Federal power act was considered by the supreme court of the United States in *United States v. Appalachian Electric Power Co.*, 311 U. S. 377, 85 L. Ed. 243, 61, S. Ct. 291, where the extent of the control of the Federal govern-

ment over navigable streams was defined. The attorneys general of forty-one states (including the state of Washington) filed a brief as *amici curiae,* in which they contended that the power of the government to control the erection of structures in such streams did not include the power to prescribe conditions not related to navigation. The court stated the relationship between Federal and state control over navigable streams to be as follows:

"The power of the United States over its waters which are capable of use as interstate highways arises from the commerce clause of the Constitution. 'The Congress shall have Power . . . To regulate Commerce . . . among the several States.' It was held early in our history that the power to regulate commerce necessarily included power over navigation. To make its control effective the Congress may keep the 'navigable waters of the United States' open and free and provide by sanctions against any interference with the country's water assets. It may legislate to forbid or license dams in the waters; its power over improvements for navigation in rivers is 'absolute.'

"The states possess control of the waters within their borders, 'subject to the acknowledged jurisdiction of the United States under the Constitution in regard to commerce and the navigation of the waters of rivers.' It is this subordinate local control that, even as to navigable rivers, creates between the respective governments a contrariety of interests relating to the regulation and protection of waters through licenses, the operation of structures and the acquisition of projects at the end of the license term. But there is no doubt that the United States possesses the power to control the erection of structures in navigable waters."

The court upheld the conditions in the license to which objection had been made and again referred to the power of the government, saying:

"The respondent is a riparian owner with a valid state license to use the natural resources of the state for its enterprise. Consequently it has as complete a right to the use of the riparian lands, the water, and the river bed as

can be obtained under state law. The state and respondent, alike, however, hold the waters and the lands under them subject to the power of Congress to control the waters for the purpose of commerce. The power flows from the grant to regulate, i.e., to 'prescribe the rule by which commerce is to be governed.' This includes the protection of navigable waters in capacity as well as use. This power of Congress to regulate commerce is so unfettered that its judgment as to whether a structure is or is not a hindrance is conclusive. Its determination is legislative in character. The Federal Government has domination over the water power inherent in the flowing stream. It is liable to no one for its use or non-use. The flow of a navigable stream is in no sense private property; 'that the running water in a great navigable stream is capable of private ownership is inconceivable.' Exclusion of riparian owners from its benefits without compensation is entirely within the Government's discretion.

"Possessing this plenary power to exclude structures from navigable waters and dominion over flowage and its product, energy, the United States may make the erection or maintenance of a structure in a navigable water dependent upon a license. This power is exercised through § 9 of the Rivers and Harbors Act of 1899, [33 USCA § 401], prohibiting construction without congressional consent and through § 4 (e) of the present Power Act, [16 USCA § 797 (e)]. . . .

"The point is that navigable waters are subject to national planning and control in the broad regulation of commerce granted the Federal Government. The license conditions to which objection is made have an obvious relationship to the exercise of the commerce power. Even if there were no such relationship the plenary power of Congress over navigable waters would empower it to deny the privilege of constructing an obstruction in those waters. It may likewise grant the privilege on terms. It is no objection to the terms and to the exertion of the power that 'its exercise is attended by the same incidents which attend the exercise of the police power of the states.' The Congressional authority under the commerce clause is complete unless limited by the Fifth Amendment."

Appellant argues that chapter 9, Laws of 1949, §§ 46 and 49 of chapter 112, Laws of 1949, and other related statutes are in direct conflict with § 10 (a) of the Federal power act requiring the project adopted to be "*such as in the judgment of the Commission will be best adapted to a comprehensive plan . . . for the improvement and utilization of waterpower development, and for other beneficial public uses.*"

Chapter 9, Laws of 1949, purports to (1) prohibit the building of any dam of a height greater than twenty-five feet and (2) prohibit the diversion of waters for any purpose other than fisheries, upon the Cowlitz river.

Section 46 of chapter 112 purports to authorize the supervisor of hydraulics to refuse to issue a permit to divert water, or any hydraulic permit of any nature, if in the opinion of cross-appellants the issuance thereof might result in lowering the water in any stream below the flow necessary to support the food and game fish population.

Section 47 of chapter 112 purports to require the owner or person in charge of a dam or other obstruction to provide such fish ladders or fishways as the director of fisheries may approve.

Section 48 of chapter 112 purports (in the event that the director of fisheries determines that fish ladders and fishways are impracticable) to require the person or agency who desires to build a dam or other hydraulic project to (1) convey to the state a site or sites satisfactory to the director of fisheries, erect thereon fish hatcheries suitable to the director, and provide the money necessary for operation and maintenance, or (2) pay to the state such money as the director may determine is necessary to expand, maintain, and operate additional facilities at existing hatcheries.

Section 49 of chapter 112 purports to require the written approval of cross-appellants as to the adequacy of plans

and specification for protection of fish life and as to the propriety of the proposed project and time of construction thereof in relation to fish life, before construction of the project is commenced.

Violations of §§ 47, 48 and 49 are declared to be gross misdemeanors and penalties are provided.

It is obvious that compliance with the fish sanctuary act would force abandonment of the Cowlitz power development project by appellant, and that compliance with these provisions of the Fisheries code would give cross-appellants a veto power over the power commission's right to issue appellant a license for its construction. Hence, the two state laws are in direct conflict with the Federal act, in so far as this project is concerned.

Respondents and cross-appellants, on the other hand, contend that these laws were passed for the express purpose of preserving the fisheries resources of the state and are a valid exercise of the police power. They point out that it has often been held that a state may validly enact regulations for the preservation of game and fish in the exercise of the police power. *Skiriotes v. Florida*, 313 U. S. 69, 85 L. Ed. 1193, 61 S. Ct. 924; *Foster-Fountain Packing Co. v. Haydel*, 278 U. S. 1, 73 L. Ed. 147, 49 S. Ct. 1; *State v. Towessnute*, 89 Wash. 478, 154 Pac. 805; *State ex rel. Campbell v. Case*, 182 Wash. 334, 47 P. (2d) 24.

It may be conceded that fish in the waters of the state belong to the people of the state in their sovereign capacity, that the legislature may permit or prohibit the taking thereof, and that the Federal government has no ownership of, or power to regulate the taking of, fish in navigable waters. See *Davis v. Olsen*, 128 Wash. 393, 222 Pac. 891. Nevertheless, where these state laws are in direct conflict with the Federal power act, they are invalid under the terms of the supremacy clause contained in article VI of the United States constitution. This provision reads:

"This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

Where, as here, the state and Federal acts cannot be reconciled or consistently stand together, the action of a state even under its police power must give way. The language used by the court in *Morris v. Jones*, 329 U. S. 545, 91 L. Ed. 488, 67 S. Ct. 451, 168 A. L. R. 656, relating to an analogous situation, is applicable to this case. It was there said:

"This is to argue that by reason of its police power a State may determine the method and manner of proving claims against property which is in its jurisdiction and which is being administered by its courts or administrative agencies. We have no doubt that it may do so except as such procedure collides with the federal Constitution or an Act of Congress. See *Broderick v. Rosner*, 294 U. S. 629. *But where there is such a collision, the action of a State under its police power must give way by virtue of the Supremacy Clause.* Article VI, Clause 2. There is such a collision here." (Italics ours.)

But respondents and cross-appellants argue that, assuming the supremacy of the Federal power act, Congress in enacting it did not intend to exclude the state from exercising jurisdiction and control over the fisheries resources of the state. In support of their argument that appellant must comply with the state laws protecting the fisheries resources, they cite §§ 9 (b) and 27 of the Federal power act, which we have quoted above.

Because we are of the opinion that the principal issues of law involved in this case (both as to the constitutional question and the correct interpretation of § 9 (b) and § 27 of the act) are controlled by the decision of the supreme court of the United States in *First Iowa Hydro-Electric*

Cooperative v. Federal Power Commission, supra, we will discuss this case in some detail.

In that case, the Cooperative had applied to the power commission for a license to construct a dam on the Cedar river near Moscow, Iowa, and divert all of the water (except about twenty-five second feet) from the river bed below the dam by means of an eight mile diversion canal to Muscatine on the Mississippi river, where a hydro-electric plant was to be constructed. This was a radical change. In its natural state, the Cedar river continued to flow southeasterly from the dam site for a distance of twenty-nine miles, where it flowed into the Iowa river, which, in turn, after traveling an equal distance, flowed into the Mississippi river about twenty miles below Muscatine.

After the power commission made its jurisdictional findings, the state of Iowa intervened and opposed the granting of a license on the ground that the Cooperative had no permit from the executive counsel of the state as required by the Iowa statute. The Cooperative had applied for such permit and it had been denied by the executive council.

The two sections of the 1939 Code of Iowa, which were the principal basis of the state's objection to the issuance of a license by the power commission, provided:

"7767. Prohibition-permit. No dam shall be constructed, maintained, or operated in this state in any navigable or meandered stream for any purpose, or in any other stream for manufacturing or power purposes, nor shall any water be taken from such streams for industrial purposes, unless a permit has been granted by the executive council to the person, firm, corporation, or municipality constructing, maintaining, or operating the same."

"7771. When permit granted. If it shall appear to the council that the construction, operation, or maintenance of the dam will not materially obstruct existing navigation, or materially affect other public rights, will not endanger life or public health, and any water taken from the stream in connection with the project is returned thereto at the

nearest practicable place *without being* materially diminished in quantity or polluted or *rendered deleterious to fish life*, it shall grant the permit, upon such terms and conditions as it may prescribe." (Italics ours.)

It was the state's contention that, under § 9 (b) and § 27 of the Federal power act, an applicant was required to comply with state laws before being entitled to the issuance of a license from the power commission. The power commission sustained the state's position and denied the Cooperative a license.

The case in due course was considered on certiorari by the supreme court of the United States, which overruled the contentions of the state of Iowa and remanded the matter to the power commission for further proceedings in conformity with the court's opinion.

The court interpreted the provisions of the Federal power act and concluded that chapter 363 (now chapter 469) of the Code of Iowa, and especially §§ 7767 and 7771, as quoted above, need not be complied with by an applicant for a Federal license. The court said:

"In the Federal Power Act there is a separation of those subjects which remain under the jurisdiction of the States from those subjects which the Constitution delegates to the United States and over which Congress vests the Federal Power Commission with authority to act. To the extent of this separation, the Act establishes a dual system of control. The duality of control consists merely of the division of the common enterprise between two cooperating agencies of government, each with final authority in its own jurisdiction. The duality does not require two agencies to share in the final decision of the same issue. Where the Federal Government supersedes the state government there is no suggestion that the two agencies both shall have final authority. In fact a contrary policy is indicated in §§ 4 (e), 10 (a), (b) and (c), and 23 (b). In those sections the Act places the responsibility squarely upon federal officials and usually upon the Federal Power Commission. A dual final authority, with a duplicate system of state permits and federal licenses required for each project, would be

unworkable. 'Compliance with the requirements of such a duplicated system of licensing would be nearly as bad. Conformity to both standards would be impossible in some cases and probably difficult in most of them. The solution adopted by Congress, as to what evidence an applicant for a federal license should submit to the Federal Power Commission, appears in § 9 of its Act. It contains not only subsection (b) but also subsections (a) and (c). Section 9 (c) permits the Commission to secure from the applicant 'Such additional information as the commission may require.' This enables it to secure, *in so far as it deems it material*, such parts or all of the information that the respective States may have prescribed in state statutes as a basis for state action. The entire administrative procedure required as to the present application for a license is described in § 9 and in the Rules of Practice and Regulations of the Commission."

The following language answers respondents' and cross-appellants' contention that appellant must comply with the fish sanctuary act and the Fisheries code of 1949 in order to construct the Cowlitz development:

"The securing of an Iowa state permit is not in any sense a condition precedent or an administrative procedure that must be exhausted before securing a federal license. It is a procedure required by the State of Iowa in dealing with its local streams and also with the waters of the United States within that State in the absence of an assumption of jurisdiction by the United States over the navigability of its waters. Now, that the Federal Government has taken jurisdiction of such waters under the Federal Power Act, it has not by statute or regulation added the state requirements to its federal requirements. . . .

"The Act leaves to the States their traditional jurisdiction subject to the admittedly superior right of the Federal Government through Congress, to regulate interstate and foreign commerce, administer the public lands and reservations of the United States and, in certain cases, exercise authority under the treaties of the United States. These sources of constitutional authority are all applied in the Federal Power Act to the development of the navigable waters of the United States.

"The closeness of the relationship of the Federal Government to these projects and its obvious concern in maintaining control over their engineering, economic and financial soundness is emphasized by such provisions as those of § 14 authorizing the Federal Government, at the expiration of a license, to take over the licensed project by payment of 'the net investment of the licensee in the project or projects taken, not to exceed the fair value of the property taken,' plus an allowance for severance damages. The scope of the whole program has been further aided, in 1940, by the definition given to navigable waters of the United States in *United States v. Appalachian Power Co.*, 311 U. S. 377. 'Students of our legal evolution know how this Court interpreted the commerce clause of the Constitution to lift navigable waters of the United States out of local controls and into the domain of federal control. *Gibbons v. Ogden*, 9 Wheat. 1, to *United States v. Appalachian Power Co.*, 311 U. S. 377.' *Northwest Airlines v. Minnesota*, 322 U. S. 292, 303. . . .

"As indicated by Representative LaFollette, Congress was concerned with overcoming the danger of divided authority so as to bring about the needed development of water power and also with the recognition of the constitutional rights of the States so as to sustain the validity of the Act. The resulting integration of the respective jurisdictions of the State and Federal Governments is illustrated by the careful preservation of the separate interests of the States throughout the Act, without setting up a divided authority over any one subject.

"Sections 27 and 9 are especially significant in this regard. Section 27 expressly 'saves' certain state laws relating to property rights as to the use of water, so that these are not superseded by the terms of the Federal Power Act. It provides:

"'Sec. 27. That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.' 41 Stat. 1077, 16 U. S. C. § 821.

"Section 27 thus evidences the recognition by Congress of the need for an express 'saving' clause in the Federal Power Act if the usual rules of supersedure are to be overcome. Sections 27 and 9 (b) were both included in the original Federal Water Power Act of 1920 in their present form. The directness and clarity of § 27 as a 'saving' clause and its location near the end of the Act emphasizes the distinction between its purpose and that of § 9 (b), which is included in § 9, in the early part of the Act, which deals with the marshalling of information for the consideration of a new federal license. In view of the use by Congress of such an adequate 'saving' clause in § 27, its failure to use similar language in § 9 (b) is persuasive that § 9 (b) should not be given the same effect as is given to § 27.

"The effect of § 27, in protecting state laws from supersedure, is limited to laws as to the control, appropriation, use or distribution of water in irrigation or for municipal or other uses of the same nature. It therefore has primary, if not exclusive, reference to such proprietary rights. The phrase 'any vested right acquired therein' further emphasizes the application of the section to property rights. There is nothing in the paragraph to suggest a broader scope unless it be the words 'other uses.' Those words, however, are confined to rights of the same nature as those relating to the use of water in irrigation or for municipal purposes. This was so held in an early decision by a District Court, relating to § 27 and upholding the constitutionality of the Act, where it was stated that 'a proper construction of the act requires that the words "other uses" shall be construed ejusdem generis with the words "irrigation" and "municipal."' *Alabama Power Co. v. Gulf Power Co.*, 283 F. 606, 619.

"This section therefore is thoroughly consistent with the integration rather than the duplication of federal and state jurisdictions under the Federal Power Act. It strengthens the argument that, in those fields where rights are not thus 'saved' to the States, Congress is willing to let the supersedure of the state laws by federal legislation take its natural course."

The Federal power act, as construed in the *Appalachian Electric* case, *supra*, and the *First Iowa* case, is

the supreme law of the land and, under the supremacy clause (Art. VI, U. S. constitution), is binding upon this court. On the authority of those decisions, we must hold that Congress had the constitutional power to enact the Federal power act and that, in doing so, it intended to exercise its full jurisdiction to authorize the power commission to supersede state laws purporting to prohibit or limit the construction of dams on navigable streams. By passing the act, Congress pre-empted the entire field and authorized the power commission to issue licenses for such construction upon such conditions as it deemed proper.

After the decision of the supreme court in the *First Iowa* case, *supra*, the matter was remanded to the Federal power commission, which thereafter granted the license applied for. This action was reviewed by the circuit court of appeals for the eighth circuit in *Iowa v. Federal Power Commission*, 178 F. (2d) 421. In that case, the state contended, *inter alia*, that the issuance of the license was invalid because the power commission had failed to give adequate consideration to the effect of the project on wildlife resources as required by the act of Congress of August 14, 1946. One of the conditions of the license was that:

"'The licensee shall construct, maintain and operate such fish protective devices and shall comply with such reasonable conditions in the interest of fish life as may be hereafter prescribed upon the recommendation of the Secretary of the Interior.'"

The court denied the state's petition to set aside the power commission's order granting the license, saying as to the state's contention:

"The Commission in its brief points out that, in the hearings held prior to the enactment of the Act of August 14, 1946, the Iowa Conservation Commission, as intervener, appeared and produced evidence 'with regard to fish life in the area and the probable effect of the project thereon.' Apparently, the views of the State Conservation Commission were received and considered by the Federal Power

Commission. Moreover, under the terms of the license, the applicant may still be required to do whatever may be reasonable for the protection of fish life. The defects, if any, in the Commission's proceedings relative to the protection of wildlife resources could not, in our opinion, be regarded as sufficiently vital or prejudicial to justify a vacation of the orders under review."

While it has no bearing upon the issues in this case, it may be of interest to those concerned about the preservation of anadromous fish life on the upper Cowlitz river that the power commission, as it did in the case of *Iowa* v. *Federal Power Commission*, *supra*, has placed in appellant's license conditions dealing with protection of fish life. These conditions read:

"*Article 30.* Before beginning the construction of any permanent fish ladders, fish traps or other fish handling facilities, or fish protective devices, the Licensee shall make further studies, tests and experiments to determine the probable effectiveness of such facilities and devices and shall submit plans therefor and obtain Commission approval. In making such studies, tests and experiments and in the preparation of final design plans, the Licensee shall cooperate with the United States Fish and Wildlife Service and the Departments of Fisheries and Game of the State of Washington. The Licensee shall continue its studies and investigations with respect to its proposed program of stream improvement and hatchery facilities. The Licensee shall submit quarterly reports to the Commission of its activities hereunder."

"*Article 31.* The Licensee shall construct, maintain and operate such fish ladders, fish traps or other fish handling facilities or fish protective devices and make such stream improvements and provide such fish hatcheries and similar facilities and comply with such reasonable modifications of the project structures and operation in the interest of fish as may be prescribed hereafter by the Commission upon its own motion or upon the recommendation of the Secretary of the Interior."

Furthermore, Congress since 1946 has required the Federal power commission to

". . . consult with the Fish and Wildlife Service and the head of the agency exercising administration over the wildlife resources of the State wherein the impoundment, diversion, or other control facility is to be constructed with a view to preventing loss of and damage to wildlife resources. . . ." (60 Stat. 1080, 16 U. S. C. A. (Sup.) § 662)

It is vigorously asserted by respondents and cross-appellants that appellant, being a municipal corporation created by the state, may not defy the laws of its creator In other words, assuming that appellant ever had the power to construct dams on rivers resulting in the destruction of fish life, it is contended that the legislature has taken that right away with respect to the Cowlitz river by enacting the fish sanctuary act (Chap. 9, Laws of 1949).

The legislature must be presumed to have known when enacting that law that, for at least forty years, all classes of municipal corporations had been authorized by it to operate certain public utilities. *Hutton v. Martin*, 41 Wn. (2d) 780, 252 P. (2d) 581. As last amended in 1947, the pertinent statute, (Rem. Supp. 1947, § 9488 [*cf.* RCW 80.40.030]) included power to:

"Construct, condemn and purchase, purchase, acquire, add to, maintain and operate works, plants and facilities for the purpose of furnishing such city or town and the inhabitants thereof, and any other persons, with gas, electricity and other means of power and facilities for lighting, heating, fuel and power purposes. . . ."

In *Tacoma v. Nisqually Power Co.*, 57 Wash. 420, 107 Pac. 199, appellant was seeking to condemn property for power purposes upon a petition alleging:

" 'That at all times since the year 1893 the city of Tacoma has been engaged in the business of owning, operating and maintaining works, plants and facilities for the purpose of furnishing said city and the inhabitants thereof with electricity and facilities for lighting, heating, fuel and power purposes, public and private.' "

This would seem to indicate that appellant for about sixty years has been engaged in the business of producing and selling electric power.

In *Tacoma* v. *State*, 121 Wash. 448, 209 Pac. 700, appellant was permitted to condemn state land for the purpose of constructing a dam as part of a hydroelectric project. The state contended that the city's diversion of the water of a certain stream would destroy or damage the propagation of food fish. After referring to the "broad powers conferred upon cities by our statute, Rem. Comp. Stat., § 9488," this court answered the state's objection to this condemnation of its rights as follows:

"The contention that the diversion of the waters will destroy or seriously damage the propagation of food fish, we cannot find to be sustained by a preponderance of the evidence. But even if it were, we would be reluctant to hold that the fish, by following their natural instincts, had devoted the stream to such a public purpose as would defeat the city's rights under the statutes hereinabove cited."

The passage of chapter 9, Laws of 1949, does not purport to amend or repeal Rem. Supp. 1947, § 9488. No reference whatever is made therein to municipal corporations or their right to engage in the production and sale of electric energy. It cannot be viewed as a repeal of this statute by implication.

Conceding that the legislature has the power to curtail or abolish appellant's present authority to engage in the electric utility business, we are convinced that it has not as yet exercised such power.

The Federal power act defines the term municipal corporation and authorizes the power commission to issue a license to such an entity. Appellant has complied with the state law with respect to the right of a municipality to engage in the business of developing, transmitting and distributing power. Having been granted a license by the power commission, we hold that appellant is at the present

time in the same position as any other licensee under the act. See *State ex rel. Washington Water Power Co. v. Superior Court*, 34 Wn. (2d) 196, 208 P. (2d) 849.

The further contention is made that a municipal corporation has no rights which are protected by the United States constitution. In support of this position, several cases are cited relating to the fourteenth amendment, which, in substance, guarantees to "any person" due process and equal protection of the laws, and cases relating to Art. I, § 10, prohibiting the impairment of contracts. See 116 A. L. R. 1037.

This contention is without merit because in the present case the right of appellant to proceed with the construction of this project is based on the Federal power act, which, in turn, is based on the commerce clause of the Federal constitution. Fundamentally, it is the United States whose power to regulate commerce on navigable streams is primarily being questioned in this suit. Appellant's rights under its license from the power commission are governed by the Federal power act and have no relation to the fourteenth amendment nor to Art. I, § 10, of the Federal constitution.

Since we have found that the two state laws involved in this case *to the extent that they are in conflict with* the Federal power act are inoperative, we do not deem it necessary to pass upon appellant's other contentions that these laws violate certain provisions of the state constitution and are invalid *in toto*.

Paraphrasing the language of the supreme court in concluding its opinion in the *First Iowa* case, *supra*, we hold that:

It is the Federal power commission rather than the director of fisheries and the director of game of the state of Washington which under our constitutional government must pass upon the measures necessary for the protection

of anadromous fish in the navigable streams in this state on behalf of the people of Washington as well as on behalf of all the people of the United States.

Without further extending this opinion, we deem it sufficient to state that, for the several reasons above set forth, we are of the opinion that appellant's complaint states a cause of action, and that, on the basis of the facts alleged therein, appellant, has a valid license issued by the power commission for the construction of the Cowlitz power development and that the utility bonds authorized by ordinance No. 14386 have not been shown to be invalid in any respect.

On appellant's appeal, the judgment dismissing its complaint is reversed, with instructions to overrule the demurrer thereto and to proceed further in this case consistently with the views expressed herein.

With respect to the cross-appeal, the trial court's order dismissing appellant's complaint recited that it was not necessary "to rule or pass upon plaintiff's demurrer to said cross-complaint.". Since the trial court did not pass upon that question or enter any final order regarding that issue, there is nothing for this court to review on the cross-appeal. Accordingly, it must be, and hereby is, dismissed.

MALLERY, SCHWELLENBACH, FINLEY, WEAVER, and OLSON, JJ., concur.

HAMLEY, J. (dissenting)—In my opinion, the enactment of Laws of 1949, chapter 9, p. 38 [*cf.* RCW 75.20.010, .020, .030], represents the exertion of two distinct powers of state government—the police power of the state to preserve its fishing resources, and the power to define and control the functioning of subordinate units of government.

In so far as chapter 9 is sought to be applied as an exercise of police power, it may or may not have been super-

seded by the Federal power act, a question we need not now decide. In so far as chapter 9 is sought to be applied as an exercise of the power of the state over subordinate units of government, it has not been superseded. The Federal government may not confer corporate powers upon local units of government, and the Federal power act does not purport to do so. The supersedure, if any, with respect to the exertion of police power, does not affect applicability of chapter 9 as an exercise of the other power named, for, in my view, the legislature would have intended the act to remain in force in the latter regard had the matter of supersedure been called to its attention.

That the legislature may restrict the powers of municipalities, is beyond question. Cities are limited governmental arms of the state. *Russell v. Grandview*, 39 Wn. (2d) 551, 236 P. (2d) 1061. They may exercise only those powers which are granted to them in the state constitution or statutes. Except as limited by the constitution, legislative control over municipalities is therefore plenary. *State v. Aberdeen*, 34 Wash. 61, 74 Pac. 1022; *Wheeler School Dist. v. Hawley*, 18 Wn. (2d) 37, 137 P. (2d) 1010. It follows that the legislature may enlarge or diminish powers already granted to such subordinate units of government. *State ex rel. Nat. Bank of Tacoma v. Tacoma*, 97 Wash. 190, 166 Pac. 66. Needless to say, the wisdom of any restriction which the legislature determines to place upon the corporate powers of municipalities is not an issue in this court.

That the legislature intended Laws of 1949, chapter 9, to restrict the corporate powers of municipalities with regard to the construction of the dams in question, seems clear to me. Under Rem. Supp. 1947, § 9488 [*cf.* RCW 80.40.010 *et seq.*], incorporated cities or towns are authorized and empowered to erect and build dams or other works across or at the outlet "of any lake or water course in this state." If that corporate power were left undisturbed, the whole purpose of the fish sanctuary act would be defeated.

Hence, when, in chapter 9, the legislature forbade the construction of any dam of a height greater than twenty-five feet on "all streams and rivers tributary to the Columbia River downstream from McNary Dam," it by implication amended or partially repealed Rem. Supp. 1947, § 9488, so as to restrict, to that extent, the corporate powers granted by the latter statute.

I recognize that repeals of statutes by implication are not favored, and to so work a repeal the implication must be a necessary one. *Mesher v. Osborne*, 75 Wash. 439, 134 Pac. 1092; *Generaux v. Petit*, 172 Wash. 132, 19 P. (2d) 911. But, where the subsequent legislation is contrary to, and inconsistent with, a former act, a repeal by implication is effected. *Peterson v. King County*, 199 Wash. 106, 90 P. (2d) 729. Here the conflict between Rem. Supp. 1947, § [illegible]88, permitting municipal corporations to construct dams for stated purposes across or at the outlet of "any lake or water course in this state," and Laws of 1949, chapter 9, forbidding the construction of dams of a greater height than twenty-five feet on certain water courses, is patent—they cannot both stand.

Appellant argues that the provisions of chapter 9 are not separable, and that if that chapter is superseded to any extent, it is thereby rendered wholly void.

The question here is not whether part of the statute is enforcible where the remainder has been declared invalid (as in all cases cited by appellant), but whether all of the act is enforcible as to incorporated municipalities if it is found to be unenforcible and void as to other persons and corporations.

The doctrine of separability has most frequently been applied to statutes of which one or more sections were valid and other sections, relating to other subjects, were unconstitutional. However, the rule is not limited to such instances, and when, as here, the same provision of the statute affects different classes of persons or corporations,

as to some of which it is valid, and as to others of which it may be invalid, the valid applications of the statute may be held enforcible. *State v. Bevins,* 210 Iowa 1031, 230 N. W. 865; *Robert Dollar Co. v. Canadian Car & Foundry Co.*, 220 N. Y. 270, 115 N. E. 711. In the latter case, no question as to the workability of part of a statute is presented, but there does remain the question of whether the legislature would have passed the statute knowing that it would have only its limited application. *Robert Dollar Co. v. Canadian Car & Foundry Co., supra; State v. Bevins, supra.* For a discussion of the difference between these two kinds of separability problems, see 2 Sutherland Statutory Construction (3d ed.) 175, 190-194, §§ 2402, 2413-2416.

In my view, the legislative history of chapter 9 indicates that the legislature would have restricted the corporate powers of municipalities in the respect indicated; even had it then believed that, as to persons and corporations other than incorporated municipalities, the state could not prohibit the building of such structures.

Chapter 9 was introduced as S. B. 4. After it had passed the Senate and when it was on second reading in the House, Representative William D. Shannon moved the adoption of an amendment which would have excluded from the operation of the act "the waters of the Cowlitz River lying East of Range 1 East of the Willamette Meridian." House Journal, page 215. During the debate which then ensued on this amendment, the following colloquy occurred:

"Mr. Carty: 'Mr. Speaker, I would like to ask Mr. Shannon a question.' The Speaker: 'Will the gentleman yield?' Mr. Shannon: 'Yes.' Mr. Carty: 'Just what area of this proposed dam would this line drawn in your amendment cross?' Mr. Shannon: 'A mile and a half below the Mayfield Dam.' Mr. Carty: 'Then the purpose of this amendment would be to make this act ineffective?' Mr. Shannon: 'In my opinion, it wouldn't. It would make a fish sanctuary on all of the lower part of the Cowlitz

River; on all the tributaries below the Mayfield Dam, about twenty miles from the Columbia River up.' "

As indicated in the majority opinion, the Mayfield dam is one of the two projects here in question, the other being further upstream on the same river. The purpose of Mr. Shannon's amendment, therefore, was to exclude from the act that portion of the Cowlitz river on which these two dams are sought to be constructed. After this information was disclosed during the exchange quoted above, Mr. Shannon's amendment was laid on the table and the bill was passed in its present form.

It therefore appears that the prime purpose of chapter 9 was to forestall construction of the very dams involved in this case. Nothing in the act, nor in its legislative history, indicates that the legislature intended to give ground any more than it was compelled to in enforcing the stated policy of protecting anadromous fish life in the rivers and streams tributary to the lower Columbia river. While the construction of high dams by any person or corporation would defeat that purpose, the plan of appellant city to construct the dams in question offered the real threat.

Appellant also argues that chapter 9 was enacted in violation of the Washington constitution, Art. II, § 19, pertaining to the subjects to be embraced in a bill, and the form of title; and in violation of Art. II, § 1, which vests legislative power in the Senate and House of Representatives. In my opinion, these contentions are without merit, but no useful purpose will be served by discussing them in this dissenting opinion.

I would affirm the judgment.

HILL, J. (dissenting)—I concur in Judge Hamley's dissent. I am of the opinion, also, that a *license* from the Federal government does not give the licensee the right to disregard legislation enacted by the state of Washington in the exercise of its police power.

GRADY, C. J., concurs with HAMLEY and HILL, JJ.

APPENDIX C

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Project No. 2016

In the Matter of

CITY OF TACOMA, WASHINGTON

Opinion No. 221

BY THE COMMISSION:

The City of Tacoma, a municipality in the State of Washington, on December 28, 1948 filed an application for a license under Section 4 (e) of the Federal Power Act for authority to construct, operate, and maintain the Mossyrock and Mayfield developments on the Cowlitz River in Lewis County, Washington, designated as Project No. 2016.

The Mossyrock dam would be located at about river mile 65 and the Mayfield dam at about river mile 52. The Mossyrock power plant would have an initial power installation of three generating units of 75,000 kilowatts each, with provision for a fourth unit of the same size. The initial installation at Mayfield would be three 40,000-kilowatt units with provision for a fourth unit of the same size, thus giving the two plants a combined capacity of 460,000 kilowatts. Thus, these two plants would add 190 percent to the present capacity of the Tacoma generating plants and nearly 10 percent to the present combined total installation of 4,700,000 kilowatts in the Pacific Northwest power pool. Three years would be required after authorization before the proposed plants could be placed in operation, this project being one of the most readily available sources of power in the Pacific Northwest.

Since the City of Tacoma's generating, transmission and distribution system is already interconnected with the other public and privately-owned power plants operating in the Pacific Northwest power pool, the addition of these sizable units west of the Cascade Mountains would be of benefit to all of the power consumers in the area, particularly as a diversity of rainfall on both sides of the Cascades would enable the City to firm up some of the other developments operating in the power pool, especially during the winter months when the power load is highest. In addition, these plants would be located within a relatively short transmission distance from Tacoma, Seattle and Portland, the heavy load centers in the area.

The severe power shortage in the Pacific Northwest is a matter of national concern, particularly when every effort is being made to increase the industrial output and the output of those materials calling for large blocks of low-cost power, and of course the principal increase in the power demands of the area has been due to the expanding defense requirements which must be met. Furthermore, the serious regional power shortage in this area will not be met by the planned Federal power construction, but additional generating plants must be built as rapidly as possible, especially where, as here proposed, the installation can be made with a minimum loss of time and with maximum assistance to other power suppliers.

On the other hand, Section 10 (a) of the Federal Power Act requires that licenses shall be issued only for those power projects which in the judgment of the Commission are best adapted to comprehensive plans for full development of those streams subject to Federal jurisdiction and, of course, other benefits than power production may be secured by utilization of streams in their natural state or through improvements. The engineering possibility of realizing the anticipated power benefits from the proposal

of the City is not to be seriously questioned, nor is it denied that large flood control and incidental navigation benefits would result. However, the Cowlitz River is extensively used for spawning by anadromous fish, and the City is confronted by those who contend that this natural river use will be completely destroyed by the proposed dams.

The Mossyrock dam would be about 510 feet in height and the Mayfield dam about 240 feet in height, both above bedrock, and it is said that anadromous fish would be unable to reach the pools above the dams, particularly the higher of the two, during the spawning season, nor could the small fingerlings find their way downstream. Fish ladders having a vertical ascent of 65 feet are in operation at the Bonneville dam and the same facilities are planned at the McNary dam just upstream to make possible an ascent of 92 feet, but no fish ladders over 200 feet in height have been installed at any other dam. Furthermore, it is said, the other fish handling facilities and conservation measures proposed by the City will not be effective and the present valuable fishery resources will be destroyed.

In addition to offering physical obstacles to fish passage upstream and downstream, the State Attorney General, the Department of Fisheries and Game, and the Washington State Sportsmen's Council, Inc., object to the proposed dams on legal grounds. They argue that the application should be denied because construction of any dam greater than 25 feet in height is forbidden by the State Columbia River Sanctuary Act in any tributary of the Columbia downstream from the McNary dam and within the migratory range of anadromous fish. We recognize, of course, that any State statute represents an expression of the intention of the Legislature by which it was enacted, but since we are dealing here with the applicability of a

Federal statute it is equally clear that a State statute cannot stand as a complete legal bar to authorization of a State prohibited project if in the judgment of the Commission that project is best adapted to comprehensive plans and would be of unmistakable public benefit. We should not, merely in reliance upon the State Sanctuary Law, attempt to escape responsibility for considering the broader public interest questions before us under the Federal Power Act.

Another bar to approval of the application suggested by the interveners, and apparently relied upon by the Examiner, is the Columbia River Review Report submitted in 1948 by the United States Army Corps of Engineers. This is presented to us as a specific recommendation for indefinite postponement of any water-power development on the Cowlitz River because that river was included in the Lower Columbia Fisheries Plan prepared by the United States Fish and Wildlife Service in cooperation with the Fish and Game Commissions of the States of Washington, Oregon and Idaho, and because the Army Engineers were said to be of the opinion that the Cowlitz River was needed as a spawning area for fish and that there was an adequate supply of electric power available elsewhere in the Columbia Basin.

We note initially in this connection that while Congress has appropriated funds for certain of the developments included in the 1948 report it has not given its approval to the Lower Columbia Fisheries Plan nor to the basin plans of the Army Engineers. The current views of the Chief of Engineers were expressed in his report to this Commission under Section 4 (e) of the Federal Power Act on the application of the City of Tacoma for a license for Project No. 2016. In reporting to the Commission the Chief of Engineers says that no recommendation had been made in the Review Report for development of the Cowlitz

sites because of the interest of local communities in undertaking such development and because of the need for correlation of power development by local interests with the needs of preservation of the fishery resources. In other words, in 1948 the Chief of Engineers recognized the local interest of the City of Tacoma in development of the Cowlitz, which would render Federal investments unnecessary, and he was of the opinion that the power supply was then adequate. As we now see, the power supply is presently inadequate and the City of Tacoma desires to proceed.

The comments of the Commission upon the 1948 Review Report were, of course, directed principally to the power features of the plan there submitted. The Commission has neither the responsibility nor the necessary staff for making an independent evaluation of other uses than power in commenting upon such comprehensive plans of the Army Engineers as were submitted in 1948 and it made no attempt at that time to weigh the merits of the proposal of the United States Fish and Wildlife Service to postpone consideration of the development of those streams tributary to the lower Columbia River. Since the Army Engineers did not then propose Federal development of the Cowlitz River, the Commission was justified in taking the recommendations of the Fish and Wildlife Service at their face value. Upon the filing of the instant application, however, the responsibilities assigned to the Commission under the Federal Power Act made impossible any further postponement of consideration of the development of the Cowlitz River and required full and impartial evaluation of the applicant's proposal on its merits and the objections thereto, including full opportunity to all Federal and State agencies in any way interested in the proposal to present their views and relevant information in support of their recommendations.

This leaves for discussion the claims of the applicant and of the fishery interests with respect to the fishery resources of the Cowlitz River upstream from the Mayfield dam, the effects reasonably to be anticipated from construction of the proposed dams, and the economic and public benefits under natural conditions and with the improvements proposed by the City.

Since the stream discharge below the Mayfield dam would be smoothed out seasonally to a substantial degree, there would not appear to be any jeopardy to the fish population below that dam if the construction proposed is undertaken. In fact, the evidence indicates that there may be an increase in those fishery resources. The daily power operations at Mayfield should be such as not to injure the fish, and we should reserve the right to consider this situation from time to time as occasion arises.

The important anadromous fish inhabiting the Cowlitz watershed are the spring chinook, fall chinook, silver salmon, the steelhead and cutthroat trout, and the smelt.

The salmonoids and the smelt perish after spawning while the sea-run trout spawn several times before dying. Each race of the anadromous fish of Cowlitz River watershed utilize spawning areas suitable to its ecological niche and each has well defined migratory and spawning habits of its own. The anadromous fish use the fresh water of the Cowlitz River for spawning purposes and early rearing of the young, the greater portion of their growth and life being associated with the sea. Most of the anadromous fingerlings migrate to sea during the spring of the year. The effect of man-made changes and of pollution on the fish has been adverse to some degree. The reduction of pollution through increase in low water flow, as proposed by the applicant, should be beneficial.

The Examiner made certain findings as to the gross and net values of the fish using the Cowlitz River, and while

there may be some question as to the actual values, we are adopting his findings for the purpose of our analysis, since the values which he adopted appear to be ample. Although the values assigned to the recreational aspects of the fishing may be in part conjectural, the commercial fishing values have a fairly substantial foundation. In any event, we are convinced that the Cowlitz is an important fishery stream in the Columbia River system and our inquiry into the possibility of loss of any portion of these natural resources has been upon the assumption that whatever the actual values may be, they are of material importance to the people of the area and should not be lightly brushed aside.

Although the sports fishery, constituting a form of recreation has been evaluated in monetary terms, a suggestion has been made that it may in addition have substantial intangible values. The fact that such recreation may have intangible values does not mean that they are large or significant and there is no basis for assuming that they outweight the rather tangible and large flood control, navigation and power benefits which can result from the improvements proposed. In this particular region, as in many other sections of Washington and Oregon, there are many recreation areas of the sports fishery type and we are not faced with a unique situation as was the case when we required a substantial power loss at a Kern River dam in California in order to provide recreational advantages which could not otherwise be obtained. Therefore, there is no substantial basis for holding that the sports fishery in the upper Cowlitz has any significant intangible recreational values. Furthermore, the proposed reservoirs undoubtedly will offer other types of recreational opportunities similiar to those afforded at other large reservoir projects in other streams, so that there should not be a total loss of recreational values as apparently suggested.

There would not be too much of an anadromous fishery problem at these and similar dams if means could be found for passing the adult migrants upstream and the fingerlings downstream. To get the adult fish by the dams for spawning in the upstream areas, the City proposes to construct fish ladders and also to provide trapping and hauling facilities, so that they may reach natural spawning grounds. As a complement to the other fish protection measures, both as related to upstream and downstream migrations, the City proposes to construct and operate extensive fish hatchery facilities for artificial propagation of the fish and development of fingerlings capable of making the migrations to the sea.

The testimony does not show that fish ladders of the heights proposed, 185 feet of ascent in one case and 325 feet in the other, would be fully effective, and of course no one can tell until a test has been made and actual conditions studied. Also details of construction must be worked out, such as entrance ways and attraction water for the fish ladder, the use of resting pools and the design of adequate means to pass the fish into the Mossyrock reservoir at different elevations of water. However, in this respect, as in connection with the other fish protective measures proposed, the details have yet to be worked out. With suitable design to permit a wide range of operating variations to meet situations reasonably to be anticipated, there would be provided here a full-scale laboratory for research and experimentation by means of which the answers to many perplexing problems of fish protection and propagation can be obtained. The recommendation of the Examiner for denial of the license until the City completes further experimentation at its own expense does not appear to offer a practical solution to the problem, especially when there would be no assurance that the City would be given final authorization without many years of

further study. Also, this recommendation would seem to rest upon the assumption that none of the measures proposed at this time would be of material assistance in saving the fish runs, an assumption which is not supported by the record.

It has been asserted that by the time satisfactory evidence can be obtained as to the success of the fishery conservation facilities proposed by applicant, the fishery resources may well be reduced to insignificance. Being cognizant of this possibility, we propose that the hatchery facilities be provided soon enough to assure initially maintenance of a sizable seed stock and later to complement the natural productivity above the dams. The use of fish hatcheries has been particularly successful in connection with runs of fall chinook and silver salmon, which constitute about 70 percent of the total commercial fish and about 60 percent in value of the commercial and sport fish. Furthermore, a substantial portion of the $20 million proposed for Federal expenditure in the Columbia River fisheries plan, probably almost half of the total sum, is to be spent for construction of fish hatcheries and related facilities. This would seem to be an endorsement of this method of preserving anadromous fish and an indication that it should be used on the Cowlitz River.

Regardless of the details of the methods used, the record shows that adult anadromous fish are now being passed upstream by high dams successfully and that by trapping and hauling on the Cowlitz similar fish could be taken past the proposed dams reasonably satisfactorily.

While there are several biological and engineering problems to be studied in connection with the ladder system, the record clearly does not support a rejection of the proposals at this time. We recognize that the problems will differ in several details during the construction period and after the dams are placed in opera-

tion, and the best solutions must be decided upon for each period. Studies of these problems should go forward promptly and we expect the City either to employ its own biologist or to make suitable arrangements with the State of Washington for expert assistance in exploring all possible means of working out the details of this and other problems dealing with the fishery conservation facilities.

It is when we come to the facilities proposed by the City for passing fingerlings downstream past or through the dams that the novelty of the proposal is evident. After spawning in the headwaters the adult salmon perish. The fry fish which come from eggs remain in the fresh water for several months, sometimes as long as two years, before beginning their migration downstream to salt water where their principal growth takes place. At the time of their downstream passage these fingerlings are seldom over six inches in length and the problem on streams and rivers having dams has been to provide for their passage without injury or substantial loss. Up to the present time there have been no constructive proposals for passing fingerlings downstream past dams. Usually the fingerlings make their way over spillways or through turbines and in each case there are losses.

To solve this problem in a new and untried manner, the City proposes to incorporate a system of passageways and chambers in the upper Mossyrock dam to which the fingerlings will be attracted and through which they will pass. The downstream fish passing system for the lower Mayfield dam will be much more simple as the reservoir behind it will not have a substantial fluctuation. The turbine intakes at Mossyrock and Mayfield dams would be screened off to prevent entry of any fish.

At Mossyrock dam a series of entries or ports would be provided in the upstream face of the dam through which the fish would enter a trunk passageway to a large tank and thence through other passageways being

gradually passed through the dam and released at a proper point downstream. As the flows at the penstock intakes would be only about 3,300 c.f.s. spread over a 28-foot opening, there would be a low velocity of approach and therefore the problem of screening should not be difficult of solution. If the fingerlings can be induced to enter the ports along the upstream face of Mossyrock dam, the problems of pressure and movement through the dams would be largely engineering. It is clear from the record that many details of the downstream passing facilities are yet to be worked out.

Conclusion

From our analysis of the evidence in the record and the arguments advanced on both sides we have reached the conclusion that a fair and reasonable balance can be struck. Probably not all of the present fishery values could be salvaged if the proposed dams are constructed, but certainly not all of those values would be lost as the interveners seem to contend.

We are required to consider all of the possible advantages and disadvantages of the City's proposal from the standpoint of the greatest public benefit through the use of these valuable water and other natural resources. The question posed does not appear to us to be between all power and no fish but rather between large power benefits (needed particularly for defense purposes), important flood control benefits and navigation benefits, with incidental recreation and intangible benefits, balanced against some fish losses, or a retention of the stream in its present natural condition until such time in the fairly near future when economic pressures will force its full utilization. With proper testing and experimentation by the City of Tacoma, in cooperation with interested State and Federal agencies, a fishery protective program can be evolved which will prevent undue loss of fishery values

in relation to the other values. For these reasons we are issuing the license with certain conditions which are set forth in our accompanying order.

THOMAS C. BUCHANAN,
Acting Chairman

CLAUDE L. DRAPER,
Commissioner

NELSON LEE SMITH
Commissioner

HARRINGTON WIMBERLY,
Commissioner

Dated at Washington, D. C.,
this 27th day of November, 1951.

LEON M. FUQUAY, *Secretary.*

Date of Issuance: November 28, 1951

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Thomas C. Buchanan, Acting Chairman; Claude L. Draper, Nelson Lee Smith and Harrington Wimberly.

November 27, 1951

Project No. 2016

In the Matter of

CITY OF TACOMA, WASHINGTON

Order Issuing License (Major)

Application was filed on December 28, 1948, and later supplemented, by the City of Tacoma, Washington, for a

license under the Federal Power Act for a proposed hydroelectric development, designated as Project No. 2016, to be located on the Cowlitz River in Lewis County, Washington.

A public hearing on the application was held in Washington, D. C., commencing on November 2, 1950, before an Examiner of the Commission, in which hearing all parties, including the Applicant and the Staff of the Commission, as well as two agencies of the State of Washington, the Attorney General of the State of Washington, and the Washington State Sportsmen's Council, Inc. participated, and presented testimony and documentary exhibits. In addition, the Commission itself held a portion of the hearing in Tacoma, Washington, at which all persons desiring to speak either in favor of or in opposition to the issuance of a license for the proposed project were heard. After the close of the hearing, briefs were filed by the various parties and by the Staff and a recommended decision was rendered by the Presiding Examiner containing findings and conclusions. On October 31, 1951, the Commission heard oral argument on exceptions to the Examiner's recommended decision.

For the reasons set forth in Opinion No. 221, adopted this date and made a part hereof by reference, and upon consideration of the entire record in this matter, including the reports of the Federal agencies, protests from interested citizens, the briefs of the parties filed in connection therewith, the Examiner's recommended decision and the oral argument thereon, the Commission *finds:*

(1) As previously found by the Commission, construction and operation of the two dams and reservoirs comprising proposed Project No. 2016 will affect lands of the United States; and could be so operated as to materially affect the navigable capacity of the Cowlitz River below the site of the proposed projects; and either or both of the reservoirs will affect the interests of interstate or foreign commerce.

(2) The project proposed by the Applicant will consist of two dams and appurtenant reservoirs named Mossyrock and Mayfield, respectively, located on the Cowlitz River in the State of Washington. Mossyrock, with a usable reservoir storage capacity of 824,000 acre-feet, will have an initial installed capacity of 225,000 kilowatts and an ultimate installed capacity of 300,000 kilowatts. Mayfield will have a usable reservoir storage capacity of 21,000 acre-feet, an initial installed capacity of 120,000 kilowatts, and an ultimate installed capacity of 160,000 kilowatts.

(3) The project proposed by the Applicant will have initially a plant capability varying from 345,000 kilowatts at full head to about 270,000 kilowatts, depending upon the amount of drawdown. The average dependable capacity over a 50-year period will be 275,000 kilowatts. The average annual energy output will be about 1400 million kilowatt-hours. Because of the diversity in stream flow and the large storage capacity which will be provided in the Mossyrock reservoir, a like amount of energy will also be available during a year of most adverse stream flow on the systems of the cities of Tacoma and Seattle, or on the systems of the Northwest Region.

(4) During the months of October through the following May all or a part of up to 260,000 acre-feet of the storage capacity of the Mossyrock reservoir will be reserved for temporary storage of flood waters and in most water years additional storage capacity will be available for the storage of flood waters under the plan of operation.

(5) Operation of the project in the interest of flood control will be equivalent to reducing the flood of record (December 1933) on the Cowlitz River (should it re-occur) from 140,000 cubic feet per second at Castle Rock, Washington, to 70,000 cubic feet per second (bank full capacity) at Castle Rock.

(6) Water traffic on the Cowlitz River is presently confined largely to the lower six or seven miles of its length, but the river may be navigated for some miles upstream.

(7) The project will be operated so as to increase the average minimum flow in the river between Toledo and Castle Rock, Washington, from about 1,000 cubic feet per second to 2,000 cubic feet per second with the resulting 6-inch increase in navigable depths over the shoals in the river between those two places.

(8) The two proposed reservoirs will be easily accessible by a state highway and will offer substantial recreational opportunities to people from local and distant areas.

(9) The future peak loads for the systems of the cities of Tacoma and Seattle will probably increase annually by at least 40,000 kilowatts and the energy requirements will probably increase annually by at least 200 million kilowatt-hours. These probable annual increases in peak load and energy requirements do not include additional load and energy to be required as the result of defense activities.

(10) The dependable capacity of the hydroelectric power plants of the Tacoma and Seattle systems, including the addition of new hydroelectric capacity presently planned or being installed, but exclusive of the Cowlitz project, is 700,000 kilowatts when used to serve a combined power load of 1,165,000 kilowatts. The dependable capacity is somewhat less when used to serve combined loads of smaller magnitude. This 700,000 kilowatts of dependable hydroelectric capacity will not be sufficient to serve estimated system load of Tacoma and Seattle beyond 1953.

(11) The Northwest Region has been deficient in dependable capacity to supply the area loads for 1946 to 1949 and during those years the amount of load actually carried was in excess of dependable capacity because the river flows were in excess of those experienced during the period of the most adverse stream flow. In addition, some loads were carried on an interruptible basis.

(12) During the winters of 1947-1948 and 1948-1949 a shortage of power supply occurred in the Northwest Region, resulting in curtailment of load. Only because exceptionally good water conditions existed

during the winter of 1949-1950 was it possible to escape serious curtailment of loads during that period.

(13) There have been restrictions on the additions of new loads on the electric systems of the Northwest Region prior to the advent of the national emergency and the power shortage is even more serious at the present time in spite of the speed-up efforts being made by the agencies of the Federal Government and others to provide additional power supply as quickly as possible.

(14) The actual loads in the Northwest Region have been exceeding estimated loads for the present water year 1950-51.

(15) The existing power shortage in the Northwest Region is more acute in the area on the west side of the Cascade Mountains, including the Puget Sound area, than it is on the eastern slopes of the Cascades.

(16) In recent years the Federal Government has provided the major portion of new power supply provided in the Northwest Region. The various Federal schedules known as "Advance Programs" show that the estimated time when new generating units would be placed in operation in the Columbia River basin have not been met.

(17) Because of the time lag which has developed between growth or requirement for power and construction of power supply facilities, there will not be firm power available to supply full potential loads until after 1958 and interim power supply for some new industrial loads will necessarily be sold on an interruptible basis.

(18) At the present time, during the national emergency, steps are being taken to provide as much new power supply as possible to meet the new defense electric loads. A tentative so-called "speed up program" of construction of new power supply has been prepared by the Bonneville Power Administration and others for the primary purpose of obtaining additional power supply for defense loads. This program is in final form and further authorization and funds must

be obtained from Congress before the program can be completed.

(19) If a critical water year should occur in the winter season of 1950-51 there would be a 425,000-kilowatt average power shortage in the Northwest Region of which only 125,000-kilowatts would be interruptible load.

(20) Based on estimated future loads for the Northwest Region and the estimated power supply that is to be provided to supply such loads, there will be a deficiency of dependable capacity in the Northwest Region until about 1960, at which time there should be just about sufficient capacity for load and for adequate reserves. Without the addition of new defense loads, the deficiency in dependable capacity in 1955 will be about 430,000-kilowatts, and there could be a deficiency in plant capability of as much as 870,000-kilowatts. Should an adverse water year be experienced prior to the year 1954, it would be necessary to curtail seriously the general service load of the Northwest Region.

(21) As the Northwest Region will continue to be deficient in power supply for approximately the next ten years, only such new loads can be taken on as can be supplied by development of new power sources.

(22) There will be a power market available for the type of power that could be produced by the Cowlitz Project as soon as that output would be made available and there will also be a market for all other new sources of power that might be developed under existing plans. Because of its size, location and characteristics of power output, the Cowlitz Project will be an exceptionally valuable addition to the Northwest Region power supply and, will relieve to some extent the power shortage which may continue for almost a decade.

(23) Annual peak power demand in the Northwest Region occurs during the period when the flow of water in the main stem of the Columbia River is low. As the flow of the Cowlitz is high at the time the flow of the Columbia is low, the Cowlitz Project output could fit

into and be of material advantage to the coordinated operation and permit utilization of this diversity in stream flow to supply a large block of power at the time of regional system peak loads. The addition of 345,000-kilowatts of installed capacity which could be provided initially by the Cowlitz Project, if made within three years, would assist greatly in alleviating the power shortage in the Northwest Region and because the project would be located in western Washington, a displacement of power flows from the eastern portion of the Bonneville system into the Tacoma-Seattle-Portland area would result in a reduction in transmission line losses. Further, the Cowlitz River Project will improve the flexibility of the Northwest Power Pool by making available more synchronizing power west of the Cascade Mountains.

(24) By adding from 270,000 kilowatts to 345,000 kilowatts of new capacity, the Cowlitz Project will reduce substantially the amount of "load-shedding" in the Tacoma-Seattle area that now occurs when operating troubles develop on the system of the Northwest Power Pool.

(25) During the flood periods on the Columbia River the Cowlitz Project could offer substantial power assistance to the Portland area.

(26) On the basis of the evidence in this record, none of the hydroelectric projects suggested for construction in lieu of the Cowlitz Project can be constructed as quickly or as economically as the Cowlitz Project.

(27) The Applicant has a preference, under the law, over private utilities in the purchase of power from Bonneville Power Administration.

(28) The only new sources of power supply in substantial quantities that could be constructed by the Applicant and placed on the line by 1954 consist of the proposed Cowlitz Project and new steam electric plants.

(29) The cost of the proposed project will be about $135 million exclusive of any required fish handling facilities.

(30) The estimated cost of the fish handling facilities presently proposed by the Applicant for construction as a part of the proposed project is $7,100,000.

(31) The annual value of Cowlitz power will exceed the annual cost of producing that power by at least $1,700,000 based on an interest rate of 2 percent.

(32) Although no monetary value has been assigned to the flood control or navigation benefits which could be provided by the project, the former benefits will be substantial and the navigation benefits will be direct and of increasing usefulness.

(33) For an average cost of money of 2.5% for 42 years or 2.75% for 38 years, the ratio of gross earnings to debt service requirements would be 1.5 under the existing rate schedules of the Applicant with a minimum realization of 6 mills per kilowatt-hour, and a debt of $135 million could be financed by the City of Tacoma system at a satisfactory average money cost. If the Cowlitz Project cost were $142 million rather than $135 million, the debt could also be retired in reasonable time.

(34) The project as proposed by the Applicant will utilize to the maximum feasible extent all of the fall and the full flow of the Cowlitz River throughout the reach of the river to be developed and the available water resources in the reach of the Cowlitz River involved for power, navigation and flood control purposes.

(35) The project, if constructed according to the plans submitted by the Applicant, will be safe and adequate to develop the available water resources at the two sites for power purposes and the plans for the power features of the project conform with accepted engineering practices.

(36) Proposals by the U. S. Fish and Wildlife Service for the improvement of spawning conditions and an increase of the salmon runs into tributaries to the lower Columbia River have been expanded and formalized by the Fish and Wildlife Service in the Lower Columbia River Fishery Plan. The purpose of the plan is to conserve, rehabilitate and enhance the fishery resources of the Columbia Basin, and the

plan was devised to offset effects caused by constructed and proposed dams in the Columbia River Basin.

(37) The Lower Columbia River Fishery Plan was conceived around 1945. In 1946 Congress provided legislation which enabled the States to be brought directly into the program, and on June 23, 1948, the Fish and Game Commissions of the States of Washington, Oregon, and Idaho entered into an agreement with the Fish and Wildlife Service outlining the areas of authority of the States and the services and duties of each under this fisheries program. The program generally is to be performed by the States under the agreement, with funds appropriated by Congress in the annual appropriation made to the Army Engineers to carry out its civil functions, and these funds are then transferred by the Army to the Fish and Wildlife Service.

(38) While Congress has not specifically approved or adopted the $20,000,000 Lower Columbia River Fishery Plan, it specifically authorized and appropriated funds in the fiscal years of 1949, 1950 and 1951 to be used for specific facilities included in the Plan.

(39) Both the U. S. Bureau of Reclamation and the Army Engineers have subscribed to the objectives of the Lower Columbia River Fishery Program and to its completion by the Fish and Wildlife Service as rapidly as funds will permit. The Army Engineers in the comprehensive basin plan included in the "Review Report on Columbia River and Tributaries" have given full approval to this program, and have recommended that development of the basin be so scheduled as to permit the full implementation of the program. The Board of Engineers for Rivers and Harbors have recommended that the fishery program be advanced, and the Chief of Engineers in his letter transmitting the Review Report to the Secretary of the Army for submission to the Congress recommended that Congress give favorable consideration to the Lower Columbia River Fisheries Plan.

(40) While there are several problems which require both engineering and biological study in connection with

the fish ladder system proposed for passing upstream migrants over the proposed dams before adoption of a final design, the present data in the record is promising enough in prospect as to not support a rejection of such a ladder system at this time. The alternative method of trapping and hauling upstream migrants past the dams should produce reasonably satisfactory results.

(41) While the record does not show conclusively whether certain features of the facilities proposed for passing downstream migrants would be adequate to prevent excessive losses, the record does indicate that with proper testing and experimentation it should be possible to provide fish handling facilities of the type proposed which will prevent undue losses of downstream migrants. Further tests and experimentation should be made before any permanent features of the fish handling facilities for downstream migrants are constructed.

(42) While the Applicant has proposed conservation practices, facilities and improvements for conservation of the fishery resources of the Cowlitz River watershed in addition to the facilities proposed for installation at or in the dams, such proposals and the effect thereof are not sufficiently detailed in the record to permit an adequate appraisal of their effectiveness. However, they show enough promise to justify the carrying through of more detailed studies and plans.

(43) On the Cowlitz River watershed the total annual gross value due to all fish, regardless of species, attributable to the area above Mayfield, is roughly equal to that below Mayfield, in each case being about one million dollars.

(44) The annual net dollar value due to the fish attributable to the area above Mayfield is about equal to that below Mayfield, and in each case that value may be considered roughly as being approximately $600,000. The annual net value due to fish, exclusive of recreational values derived from the sportsmen's catch, is estimated to be about $515,000 above Mayfield and about $445,000 below Mayfield.

(45) The annual net recreational dollar value of the sportsmen's catch of anadromous fish attributable to the Cowlitz River system above Mayfield is estimated to be about $76,000 which is one-half the estimated gross recreational fish value. The annual net recreational dollar value which would be provided by the Mayfield and Mossyrock reservoirs would offset, to an extent which cannot be now determined, the loss of recreational value occasioned by the construction of the project.

(46) The annual net recreational value of the sportsmen's catch of anadromous fish attributable to the Cowlitz River basin below Mayfield is estimated to be about $136,000.

(47) The investment cost of facilities and improvements for the Applicant's fishery resources program, if permitted to proceed under license, would be at least $9,465,000. Using this estimated cost, which has been derived by the Staff, the annual cost of operating and maintaining facilities and improvements plus the fixed charges on the investment may be estimated at $610,000.

(48) The record does not show that construction, maintenance and reasonable operation of the Cowlitz Project would have any substantial adverse effect on the fishery resource below the Mayfield site, and there are indications that conditions downstream will be improved somewhat when the project is constructed.

(49) If it is assumed that there would be no measurable loss of the fishery resources of the Cowlitz River system resulting from the construction, operation and maintenance of the proposed project, the annual net benefits of the proposed project, exclusive of navigation and flood control benefits, would be $1,090,000 ($1,700,000 power value less $610,000 fish facilities operating cost).

(50) If it is assumed that one-half of the fishery resources above Mayfield is saved after construction of the proposed project, the annual net benefits of the project, exclusive of navigation and flood control benefits,

would be $790,000 ($1,700,000 power value less $610,000 fish facilities operating cost less $300,000 fish loss).

(51) Even if no fish were saved above Mayfield after construction of the proposed project, the annual net benefits of the project exclusive of navigation and flood control would be $499,033 ($1,700,000 power value less $610,000 fish facilities operating cost less $590,967 fish loss).

(52) Based on cost data in the record and on estimates made to approximate other costs, the Cowlitz Project would be financially and economically feasible if constructed in accordance with the plans as presently submitted.

(53) The Applicant is a municipal corporation; it has submitted satisfactory evidence of compliance with the requirements of all applicable State laws insofar as necessary to effect the purposes of a license for the project; and it is a municipality within the meaning of Section 3 (7) of the Act.

(54) The Applicant has submitted satisfactory evidence of its ability to finance and carry to completion the project described in the application, with such modifications as may be found to be appropriate.

(55) No conflicting application is before the Commission. Due public notice has been given.

(56) The proposed project will not affect any Government dam, nor will the issuance of a license therefor as hereinafter provided affect the development of any water resources for public purposes which should be undertaken by the United States.

(57) The issuance of a license for the project will not interfere or be inconsistent with the purposes for which any reservation or withdrawal of public lands was created or acquired.

(58) The ultimate installed horsepower capacity of the project hereinafter authorized is 474,000 horsepower, and the energy generated thereby will be sold or used by the Licensee.

(59) Under present circumstances and conditions and upon the terms and conditions hereinafter included in the license, the project is best adapted to a comprehensive plan for improving or developing the waterway involved for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, for the conservation and preservation of fish and wildlife resources, and for other beneficial public uses including recreational purposes.

(60) The amount of annual charges to be paid under the license for the purpose of reimbursing the United States for the costs of administration of Part I of the Act is reasonable as hereinafter fixed and specified, and the amount of annual charges to be paid under the license for the purpose of recompensing the United States for the use, occupancy and enjoyment of its lands, including transmission line right-of-way, should be later determined.

(61) In accordance with Section 10 (d) of the Act the rate of return upon the net investment in the project and the proportion of surplus earnings to be paid into and held in amortization reserves are reasonable as hereinafter specified.

(62) The exhibits described and designated below, filed as part of the application for license as supplemented, conform to the Commission's rules and regulations and should be approved as part of the license for the project.

(63) The proposed project will consist of two developments, namely, Mossyrock and Mayfield, as follows:

(a) The Mossyrock development will be located on the Cowlitz River at about mile 65 and will consist of a concrete gravity dam or other suitable type of dam as may be determined by further investigation and design. The dam will be about 510 feet maximum height above bedrock and about 1300 feet in length at its crest and contain an ogee type spillway surmounted by 5 taintor gates.

The reservoir will extend approximately 21 miles upstream and have an area of about 10,000 acres with normal water surface at elevation 750 feet, a gross storage capacity of about 1,372,000 acre-feet, and a usable storage capacity of about 824,000 acre-feet with a 100-foot draw-down; a powerhouse built integral with the toe of the non-overflow section of the dam as a foundation, with initial installation comprising three 75,000-kilowatt units, making a total capacity of 309,000 horsepower or 225,000 kilowatts operating under a gross head which would vary from 325 to 225 feet. Provision is to be made for a fourth additional unit of 75,000 kilowatts. A step-up substation will be installed adjacent to the powerhouse. The Mossyrock development will provide flood-control storage as desired by the Chief of Engineers, Department of the Army.

(b) The Mayfield development will be located on the Cowlitz River at about mile 52 and will consist of a concrete dam composed of a small arch section across the narrow river gorge, an ogee gravity spillway section surmounted by 5 taintor gates, and 2 gravity abutment sections, the dam to have a maximum height of about 240 feet above bedrock and a length of about 850 feet at its crest; a reservoir extending approximately 13.5 miles upstream to the Mossyrock dam with an area of about 2,200 acres with normal water surface at elevation 425 feet, a gross storage capacity of about 127,000 acre-feet and a usable storage capacity of about 21,000 acre-feet with a 10-foot draw-down; a tunnel about 880 feet long, with associated concrete head works, fish screens, forebay, gate house, and steel penstocks leading to the Mayfield powerhouse; a powerhouse with initial installation comprising three 40,000-kilowatt units making a total capacity of 120,000 kilowatts, or 165,000 horsepower, operating under a gross head which would vary from 185 to 175 feet. Provision is to be made for a fourth unit of 40,000 kilowatts. A step-up substation will be installed adjacent to the power-

house. Double circuit 230-kilovolt transmission lines on steel towers will connect the two powerhouses and extend to the Cowlitz substation on the outskirts of Tacoma. These lines will have an aggregate length of about 60 miles.

(c) Such fish ladders, fish traps or other fish handling facilities or fish protective devices as may be hereafter approved by thhe Commission upon the recommendation of the Secretary of the Interior.

(d) All lands constituting the project area and enclosed by the project boundary or the limits of which are otherwise defined, and or interest in such lands necessary or appropriate for the purposes of the project, whether such lands or interest therein are owned or held by applicant or by the United States; such project area and project boundary being more specifically shown and described by certain exhibits which formed part of the application for license and which are designated and described as follows:

Exhibit J: Drawings in two sheets, Sheet 1 signed by C. A. Erdahl, Acting Mayor and Commissioner of Public Utilities, December 24, 1948, and Sheet 4 signed by C. V. Fawcett, Mayor, and approved by C. A. Erdahl, Commissioner of Public Utilities, June 15, 1949 and comprising:

Sheet 1 (FPC No. 2016-1) entitled "Location Map"; Sheet 2 (FPC No. 2016-4) entitled "General Project Map."

(e) The principal structures referred to above, the location, nature and character of which are more specifically shown by the exhibits hereinbefore cited and by certain other exhibits which also formed part of the application for license and which are designated and described as follows:

Exhibit L: Drawings in 13 sheets, signed by C. V. Fawcett, Mayor, and approved by C. A. Erdahl, Commissioner of Public Utilities, Sheet

1 on December 24, 1948 and the other sheets on June 15, 1949, and comprising:
Sheet 1 (FPC No. 2016-2) entitled "Mayfield Dam, General Plan";
Sheet 3 (FPC No. 2016-5) entitled "Mayfield Dam, Arch and Thrust Blocks, Plan and Sections";
Sheet 4 (FPC No. 2016-6) entitled "Mayfield Dam, Cross Sections Thru Spillway";
Sheet 5 (FPC No. 2016-7) entitled "Mayfield Powerhouse, Plans and Sections";
Sheet 6 (FPC No. 2016-8) entitled "Mayfield Powerhouse and Intake, Typical Section";
Sheet 7 (FPC No. 2016-9) entitled "Mayfield, One Line Diagram";
Sheet 8 (FPC No. 2016-10) entitled "Mayfield Switchyard, General Plan";
Sheet 11 (FPC No. 2016-13) entitled "Mossyrock Powerhouse, Plans and Sections";
Sheet 12 (FPC No. 2016-14) entitled "Mossyrock Powerhouse, Typical Cross Section and Elevation";
Sheet 13 (FPC No. 2016-15) entitled "Mossyrock One Line Diagram";
Sheet 14 (FPC No. 2016-16) entitled "Mossyrock Switchyard, General Plan";
Sheet 9 (FPC No. 2016-17) entitled "Mossyrock Dam, Plan and Section"; and
Sheet 3 (FPC No. 2016-18) entitled "Mossyrock Dam, Spillway Section."

Exhibit M: A statement in four sheets entitled "General Description and General Specifications of Proposed Mechanical, Electrical and Transmission Equipment for the Project" and filed June 20, 1949.

(f) All other structures, fixtures, equipment or facilities used or useful in the maintenance and operation of the project and located on the project area, including such portable property as may be used or useful in connection with the project or any part thereof, whether located on or off the project area, if and to the extent that the inclusion of such property as a part of the project

is approved or acquiesced in by the Commission; also all riparian or other rights, the use or possession of which is necessary or appropriate in the maintenance and operation of the project.

(65) The Secretary of the Army and the Chief of Engineers have approved the project plans insofar as they affect the interests of navigation and flood control, upon the license conditions hereinafter provided for the protection of such interests.

(66) The Secretary of the Interior reported that he was hopeful that with proper effort and study the fish problem could be solved and recommended stipulations for the protection of fishlife. The substance of his recommendations has been included, with the exception of a requirement limiting the fish protective devices to those approved by State agencies, a limitation which does not appear appropriate in a Federal license.

The Commission *orders:*

(A) This license is issued to the City of Tacoma, Washington, under Section 4 (e) of the Act for a period of 50 years, effective as of the first day of the month in which the accepted license is filed with the Commission by the Licensee, for the construction, operation and maintenance of Project No. 2016 upon the Cowlitz River, a stream over which Congress has jurisdiction, and upon lands of the United States, subject to the terms and conditions of the Act which is incorporated by reference as a part of this license, and subject to such rules and regulations as the Commission has issued or prescribed under the provisions of the Act.

(B) This license is also subject to the terms and conditions set forth in Form L-6 entitled "Terms and Conditions of License for Unconstructed Major Project Affecting Navigable Waters and Lands of the United States", which terms and conditions are attached hereto and made a part hereof; and subject to the following special conditions set forth herein as additional articles:

Article 28. The Licensee shall commence construction of project within two years of the effective date of this license; shall thereafter in good faith and with due diligence prosecute such construction; and shall complete the project works in 36 months.

Article 29. The Licensee shall prior to flooding clear all lands in the bottoms and margin of the reservoir up to high water level, and shall dispose of all temporary structures, unused timber, brush, refuse, or inflammable material resulting from the clearing of the lands or from the construction and maintenance of the project works. In addition, all trees along the margin of the reservoir which may die during the operation of the project shall be removed. The clearing of the lands and the disposal of the material shall be done with due diligence and to the satisfaction of the authorized representative of the Commission.

Article 30. Before beginning the construction of any permanent fish ladders, fish traps or other fish handling facilities or fish protective devices, the Licensee shall make further studies, tests and experiments to determine the probable effectiveness of such facilities and devices and shall submit plans therefor and obtain Commission approval. In making such studies, tests and experiments and in the preparation of final design plans, the Licensee shall cooperate with the United States Fish and Wildlife Service and the Departments of Fisheries and Game of the State of Washington. The Licensee shall continue its studies and investigations with respect to its proposed program of stream improvement and hatchery facilities. The Licensee shall submit quarterly reports to the Commission of its activities hereunder.

Article 31. The Licensee shall construct, maintain and operate such fish ladders, fish traps or other fish handling facilities or fish protective devices and make such stream improvements and provide such fish hatcheries and similar facilities

and comply with such reasonable modifications of the project structures and operation in the interest of fish as may be prescribed hereafter by the Commission upon its own motion or upon the recommendation of the Secretary of the Interior.

Article 32. The Licensee shall pay the United States the following annual charges for the purpose of reimbursing it for the costs of administration of Part I of the Act: One (1) cent per horsepower on the authorized installed capacity (474,000 horsepower), plus two and one-half (2½) cents per 1,000 kilowatt-hours of gross energy generated by the project during the calendar year for which the charge is made. The Licensee shall also pay to the United States such charges as may be specified hereafter for the purpose of recompensing the United States for the use, occupancy and enjoyment of its lands, including transmission line right-of-way.

Article 33. The Licensee shall, within two years of the effective date of this license, file Exhibits F and K in accordance with the rules and regulations of the Commission.

Article 34. During the months of October through May flood storage space reservation in Mossyrock Reservoir corresponding to reservoir level elevation 750, full reservoir, on 1 October, decreasing uniformly to elevation 723 on 1 December, remaining constant at elevation 723 from 1 December to 1 February, increasing uniformly from elevation 723 on 1 February to elevation 745 on 1 May and reaching elevation 750 no sooner than 1 June, shall be kept available for the temporary storage of flood water. During floods the gates shall be operated, in conjunction with the operation of the Mayfield Reservoir, so as not to exceed a flow of 70,000 cfs (bank full capacity) at Castle Rock, Washington, until the reservoir storage, if exceeding the specified reservation, has been decreased to the specified reservation.

Article 35. In the interest of navigation:

(a) The minimum release of water at the Mayfield plant shall be 2,000 cubic feet per second; and

(b) The rates of change of release of water from the Mayfield plant shall not exceed that which will cause a change of water level at the City of Castle Rock, Washington, of one foot per hour, either up or down.

(C) The exhibits specified in paragraph (63) above are approved as part of this license.

(D) This order shall become final 30 days from the date of its issuance unless application for rehearing shall be filed within the 30-day period provided by Section 313 (a) of the Act.

(E) This license shall be accepted and returned to the Commission within 60 days from date of issuance of this order.

By the Commission.

LEON M. FUQUAY,
Secretary.

Date of Issuance: November 28, 1951

APPENDIX D

STATE OF WASHINGTON DEPARTMENT OF GAME ET AL.

v.

FEDERAL POWER COMMISSION.

No. 13289.

United States Court of Appeals, Ninth Circuit.

Oct. 5, 1953.

Proceedings on petition for review of orders of Federal Power Commission granting municipality a license to construct, operate and maintain two dams with appurtenant power facilities on a navigable state river. The Court of Appeals, Stephens, J., held that evidence sustained finding that dams were necessary to alleviate power shortage in Northwest, and that the project was best adapted to comprehensive plan for improving or developing waterway for use or benefit of interstate or foreign commerce, for improvement and utilization of water power development, and for other beneficial uses, including recreational purposes.

Orders affirmed.

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Don Eastvold, Atty. Gen., William E. Hicks, Harold A. Pebbles and Lee Olwell, Sp. Assts. Atty. Gen., Olympia, Wash., for petitioners, State of Washington.

Stephen J. Morrissey, Seattle, Wash., for petitioner, Washington State Sportsmen's Council, Inc. Clarence M. Boyle, Corp. Counsel, Dean Barline, Asst. Corp. Counsel, E. K. Murray, Sp. Counsel, City of Tacoma, Washington, for intervener, City of Tacoma, Wash.

Bradford Ross, Gen. Counsel, Willard W. Gatchell and Howard E. Wahrenbrock, Assts. Gen. Counsel, John C. Mason, Atty., Federal Power Commission, Washington, D. C., for respondent.

Before STEPHENS, HEALY and ORR, Circuit Judges.

STEPHENS, Circuit Judge.

Since 1893, the City of Tacoma, a municipal corporation in the State of Washington, has produced, transmitted, distributed and sold for use electric energy generated in its own steam electric and hydroelectric plants. On December 28, 1948, the City filed with the Federal Power Commission an application for a license[1] to construct, operate, and maintain two dams (one designated as the Mossyrock, the other as the Mayfield) with appurtenant power facilities on a State of Washington river known as the Cowlitz. The Cowlitz River flows southerly into the Columbia River seaward of Portland, Oregon.

The Mossyrock Development is proposed to be located sixty-five miles upstream from the Cowlitz mouth and is to comprise a dam rising five hundred feet above bedrock which will intercept the river runoff and store the accumulated water in a natural reservoir twenty-one miles in length. The flow will be equated through the dam and through a hydroelectric power plant having an initial power potential of 225,000 kilowatts and an ultimate potential of 75,000 more kilowatts.

The proposed Mayfield Development is to be located thirteen and one-half miles downstream from Mossyrock and is to consist of a dam rising two hundred forty feet above bedrock, a power plant with an initial potential of 120,000 kilowatts with an ultimate potential of an additional 40,000 kilowatts.

The Federal Power Commission took jurisdiction of the application and, in an order issued March 8, 1949, found that the construction and operation of the project would affect lands of the United States, that the Cowlitz River was navigable below the site of the proposed dams and that

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[1] Section 4(e) of the Federal Power Act, Title 16 U.S.C.A. § 797(e).

their construction would affect the interests of interstate and foreign commerce. Accordingly, it concluded that Tacoma could not legally build the dams without a Federal Power Commission license.[2]

Thereupon the Commission ordered a public hearing to determine whether the license should issue. The "State of Washington Departments of Game", of "Fisheries" and the "Washington State Sportsmen's Council, Inc.," (a private corporation), all hereinafter to be called "Petitioners", were permitted to intervene in opposition to the City's application. The Attorney General for the State appointed a special assistant attorney general to represent all persons not otherwise represented whose views were in conflict with the State Departments of Game and Fisheries. Thus, the State of Washington by its Attorney General, and the people of Washington holding views not in harmony with the State's official position, and the applicant City of Tacoma were represented at the hearing which was had before an Examiner.

Having heard the evidence offered by the interested parties, the Presiding Examiner issued his "Recommended Decision" in which he made findings of fact with his conclusion that the application for license should be denied because the proposed construction would conflict with the comprehensive plan[3] for developing the Columbia River

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[2] Section 23(b), Federal Power Act, Title 16 U.S.C.A. § 817.

[3] The Fish and Wildlife Service of the Department of the Interior has formulated what is known as the Lower Columbia River Fishery Plan. This plan, which includes within its scope the Cowlitz River, contemplates the improvement of the fish runs on the Columbia River through the cooperative efforts of Oregon, Washington, and the United States Fish and Wildlife Service in the removal of obstructions to the passage of fish, the abatement of pollution, the screening of diversions, and the use of hatcheries and fish refuges.

"The Review Report on the Columbia River and Tributaries," prepared by the Army Corps of Engineers, included with approval the Lower Columbia River Fishery Plan.

Basin and for that reason would not be best adapted "for other beneficial public uses, including recreational purposes",[4] because "it has not been shown that the development of the Cowlitz River for power at this time is such an economic necessity as to warrant the undertaking proposed, so long as that construction may be deemed probably injurious to the protection and maintenance of the valuable runs of anadromous fish [fish which return to their spawning grounds for spawning] now utilizing the river."[5]

The City of Tacoma, the Special Assistant to the State Attorney General (opposing the position of the State Attorney General), and the Commission Staff Counsel filed exceptions to the Recommended Decision. The Commission ordered oral argument[6] and subsequently filed an opinion and order granting the license. We summarize the pertinent findings and conclusions of the Commission as follows:

1. The Commission reasserts its jurisdiction and describes the physical characteristics of the project.

2. The project will increase the navigability of the Cowlitz River by increasing the average minimum flow below the dams.

3. The reservoirs are easily accessible by state highway for recreational opportunities.

4. An annual increase of 40,000 kilowatts in peak load electric energy requirements in the Tacoma-Seattle area is anticipated. This estimate does not include defense activities.

5. There is a power shortage in the Northwest, especially in the Puget Sound area.

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[4] Section 10, Federal Power Act, Title 16 U.S.C.A. § 803(a).

[5] Record on Appeal, pp. 170-1.

[6] Title 18 C.F.R. § 1.31.

6. A ten-year power shortage is anticipated. Thus, new power sources must be developed to supply new loads.

7. There is no evidence that any other hydroelectric project in lieu of the Cowlitz Project could be constructed as quickly or as economically.

8. The cost is estimated at $135 million exclusive of fish handling facilities.

9. The cost of fish handling facilities is estimated at $7,100,000.

10. The annual value of Cowlitz power will exceed the cost of production by at least $1,700,000, based on a 2% interest rate.

11. There will be substantial flood control and navigation benefits.

12. The debt incurred in building the project can be retired in a reasonable time.

13. The Lower Columbia River Fishery Plan[7] conceived around 1945 by the Fish and Wildlife Service of the Department of the Interior and approved by the United States Bureau of Reclamation and by the Army Engineers, contemplates individual state action with the aid of Congressional appropriations.

14. The ladder system of passing fish upstream should not be rejected although engineering and biological studies must still be made.

15. Hauling and trapping should be a satisfactory alternate for getting fish upstream.

16. Testing and experimentation should make it possible to develop means of successfully passing fish downstream.

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[7] See footnote 3, supra.

17. The value of the fish spawning above the dams equals the value of the fish spawning below the dams.

18. The fish below the dams will not be injured by the dams.

19. The project is economically and financially feasible.

20. Tacoma is a municipality within the meaning of Section 3(7)[8] of the Act and has submitted satisfactory evidence of compliance with the requirements of all applicable state laws "insofar as necessary to effect the purposes of a license for the project."[9] Finding No. 53, Transcript of Record on Appeal, page 551.

21. Tacoma has submitted satisfactory evidence of financial ability to complete the project.

22. There is no conflicting application.

23. Due notice has been given to all interested parties.

24. "Under present circumstances and conditions and upon the terms and conditions hereinafter included in the license, the project is best adapted to a comprehensive plan for improving or developing the waterway involved for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, for the conservation and preservation of fish and wildlife resources, and for other beneficial public uses including recreational purposes."[10] Finding No. 59, Transcript of Record on Appeal, page 552.

Petitioners sought a rehearing, but it was denied. Thereupon, they sought review in this court.[11]

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[8] Title 16 U.S.C.A. § 796(7).

[9] Cf. Section 9(b), Federal Power Act, Title 16 U.S.C.A. § 802(b).

[10] Cf. Section 4(e), F.P.A., Title 16 U.S.C.A. § 797(e), second proviso, and Section 10(a), F.P.A., 16 U.S.C.A. § 803(a).

[11] Section 313, F.P.A., 16 U.S.C.A. § 825*l*,(a), limits rehearings to "any person, State, municipality or State commission aggrieved

It is provided in the Federal Power Act that:

"§ 9. Each applicant for a license under this chapter shall submit to the Commission—

* * * * * * * * * *

"(b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State * * * within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this chapter. * * *"

Those opposing the application challenge the authority of the Commission to issue a license upon the ground that the quoted section has not been complied with, in that:

1. Tacoma has not obtained from the State Supervisor of Hydraulics a permit for the diversion of water as required by Ch. 112, § 46, State of Washington Laws of 1949.

2. Tacoma has not obtained the written approval of the State Directors of Fisheries and of Game as to plans and specifications for the proper protection of fish life in connection with the construction of the dams as required by Ch. 112, § 49, State of Washington Laws of 1949.

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by an order issued by the Commission". And it confines review by this court to those who have applied for rehearing. Thus, as Tacoma contends in its brief, petitioners are not properly before this court unless they fit one of the categories listed in § 825*l* (a), as defined by § 796, Title 16 U.S.C.A.

Initially we note that this court has jurisdiction because the Washington State Sportsmen's Council, Inc., one of the petitioners, is a person within the definition of § 796(4), since it is a corporation. The State of Washington Department of Game and the State of Washington Department of Fisheries are proper parties since they represent certain interests of the State of Washington in this controversy. All are "parties aggrieved" since they claim that the Cowlitz Project will destroy fish in which they, among others, are interested in protecting.

3. Both of the proposed dams exceed the 25-foot height limit which the Washington legislature put upon the construction of dams on the Cowlitz River or on any stream of the State tributary to the Columbia River downstream from the McNary Dam and within the migratory range of anadromous fish. The Columbia River Sanctuary Act, Ch. 9, § 1, State of Washington Laws of 1949.

The rationale of the objectors' contentions has already been considered and rejected by the Supreme Court in First Iowa Hydro-Elec Co-op. v. Power Commission, 1946, 328 U.S. 152, 66 S. Ct. 906, 90 L. Ed. 1143. In that case the United States Supreme Court analyzed § 9(b) in the light of an Iowa statute which prohibited the building or maintaining of a dam on any navigable stream of the State of Iowa without a permit from the Executive Council of the State. In order to obtain a State permit, an applicant was required to comply with State regulation of the project. The Supreme Court held that the Iowa licensing provisions were in direct conflict with the Federal Power Act, and that if a State license were a "condition precedent to securing a federal license for the same project under the Federal Power Act * * * the Executive Council of Iowa [would possess] a veto power over the federal project. Such a veto power easily could destroy the effectiveness of the Federal Act." 328 U.S. at page 164, 66 S. Ct. at page 911. Indeed, if § 9(b) were construed to require compliance with state laws in every instance, it would make every application to the Federal Power Commission subject to state control in direct contradiction to the Congressional mandate that the project be subject to "the judgment of the Commission".[12] Therefore, the Supreme Court concluded, § 9(b) does not in itself require compliance with state law; it only empowers the Commission to require such evidence of compliance with state law as, in the Commission's judgment, would be "appropriate to effect the pur-

[12] Title 16 U.S.C.A. § 803(a), § 10(a), Federal Power Act.

poses of a federal license on the navigable waters of the United States." First Iowa Hydro-Elec. Co-op. v. Power Commission, supra, 328 U.S. at page 167, 66 S. Ct. at page 913.

The Commission in our case acted within the scope of its discretion in not requiring Tacoma to show compliance with the laws of the State of Washington regulating the construction of dams in Washington, because compliance with those laws would have prevented the development of the Cowlitz Project; and in the opinion of the Commission of the Cowlitz Project was "best adapted to a comprehensive plan" for the development of a concededly navigable stream. The Federal Government's Constitutional authority to regulate commerce and navigation includes the "power to control the erection of structures in navigable waters", United States v. Appalachian Power Co., 1940, 311 U.S. 377, 405, 61 S. Ct. 291, 298, 85 L. Ed. 243. The Federal Government's power over navigable waters is superior to that of the state. McCready v. Virginia, 1876, 94 U.S. 391, 24 L. Ed. 248.

The objectors further contend that Tacoma, as a creature of the State of Washington, cannot act in opposition to the policy of the State or in derogation of its laws.[13]

Again, we turn to the First Iowa case, supra. There, too, the applicant[14] for a federal license was a creature of the state and the chief opposition came from the state itself. Yet, the Supreme Court permitted the applicant to act inconsistently with the declared policy of its creator, and to prevail in obtaining a license.[15]

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[13] See Williams v. Mayor of Baltimore, 1933, 289 U.S. 36, 53 S.Ct. 431, 77 L. Ed. 1015.

[14] First Iowa Hydro-Electric Cooperative, a cooperative association organized under the laws of Iowa.

[15] First Iowa Hydro-Elec. Co-op. v. Power Commission, 1946, 328 U.S. 152, 66 S.Ct. 906, 90 L.Ed. 1143; State of Iowa v. Federal Power Commission, 8 Cir., 1949, 178 F.2d 421, certiorari denied 339 U.S. 979, 70 S.Ct. 1024, 94 L.Ed. 1383.

Consistent with the First Iowa case, supra, we conclude that the state laws cannot prevent the Federal Power Commission from issuing a license or bar the licensee from acting under the license to build a dam on a navigable stream since the stream is under the dominion of the United States. However, we do not touch the question as to the legal capacity of the City of Tacoma to initiate and act under the license once it is granted. There may be limitations in the City Charter, for instance, as to indebtedness limitations. Questions of this nature may be inquired into by the Commission as relevant to the practicability of the plan, but the Commission has no power to adjudicate them.[15a]

We turn now to a consideration of the petitioners' attack upon the findings of the Commission. We will, of course, set aside an order of the Commission if we find that it is not based upon findings of fact which are supported by substantial evidence.[16] But to the extent that the findings of the Commission are "supported by substantial evidence, [they are] conclusive".[17] In reviewing an order of the Commission, "this Court may not retry the controversy, substitute its judgment for that of the Commission as to any doubtful or debatable questions of fact, or reverse the challenged orders because the Commission has rejected the views of the State * * * as to what inferences should be drawn from the evidence. The Commission 'is the agency which weighs the relevance of factual data.' See National Labor Relations Board v. Stowe Spinning Co., 336 U.S. 226, 231, 69 S. Ct. 541, 545, [93 L. Ed. 638]." State of Iowa v. Federal Power Commission, 8

[15a] See City of Tacoma v. Taxpayers, et al., No. 32,411, which is now pending before the Supreme Court of the State of Washington.

[16] Pacific Power & Light Co. v. Federal Power Commission, 9 Cir., 1938, 98 F.2d 835, affirmed 307 U.S. 156, 59 S.Ct. 766, 83 L.Ed. 1180.

[17] Section 313(b), Federal Power Act, Title 16 U.S.C.A. § 825l (b).

Cir., 1949, 178 F. 2d 421, 427, certiorari denied 339 U.S. 979, 70 S. Ct. 1024, 94 L. Ed. 1383.

Petitioners concentrate their attack upon what we shall classify as two groups of findings:

1. The necessity of the dams to alleviate a power shortage in the Northwest.

2. The effect of the dams upon the fish runs in the Cowlitz River.

First, as for the necessity of the dams: It is common knowledge that there was a power shortage in the Northwest in the winters of 1947-1948 and 1948-1949, and that the further expansion of other power facilities in the Northwest which Petitioners stress must be weighed against the continued growth of industrial activity in the area, and that in years of low rainfall the capacity of all hydroelectric plants is curtailed. And national defense is a prime element for the Commission's consideration. In short, an estimated necessity for electric energy, quantitatively speaking, must not be determined alone upon present demand projected into the future in accordance with normal circumstances. Paradoxically, abnormality is the normal of the day we live in.

The Cowlitz Project is but sixty miles from Tacoma, and will permit of a much shorter transmission distance than any of the other existing or proposed hydro-electric developments. And while steam electric plants can be built which would aid in Tacoma's electrical needs, we have no part in the decision which Tacoma has arrived at and which the Commission has agreed with as to the desirability of one source of electric energy over the other.[18]

[18] Because the electric energy plants of the northwestern states produce little or no energy beyond their every-day demands, the major systems have entered into a "power pool" by interconnecting their distributing lines. By this arrangement an unusual demand upon any one plant may be met by the transfer of energy from another plant. The City of Tacoma is an integral member of the "pool".

Nor can we weigh the benefits of flood control, improved navigation of the Cowlitz, and accessibility of recreational areas. There is substantial competent and persuasive evidence on these subjects.

We must now consider the fate of the fish on the Cowlitz River. Herein lies the chief concern of those who object to the construction of the dams. They contend that the project will destroy the runs of spring Chinook salmon, fall Chinook salmon, silver salmon, steelhead trout, cutthroat trout and smelt which use the Cowlitz as spawning grounds. They point out that to pass each of the dams, the fish will have to climb ladders of three hundred twenty-five feet at Mossyrock, and one hundred eighty-five feet at Mayfield, each of which is considerably higher than the Bonneville Dam's ladder of sixty-seven feet, the highest dam over which migratory fish have been successfully passed to date.[19] They further argue that, even if some fish should manage to reach their spawning grounds above the dams, their number would be greatly depleted; and furthermore, the fingerlings, when hatched, would face the further task of avoiding destruction in the hydro electric penstocks in their journey to the sea to mature and, in their time, to return in the mysterious cycle of perpetuating the species.

There is evidence that only one-half of the fish spawn above the dam sites, and elaborate plans are contemplated by the City and required by the Commission's order looking to the safe transmission of the fish to the spawning areas above the dams.

As we see it, it is not within our jurisdiction to prescribe a policy. The Federal Government has the jurisdiction over navigable rivers and it is within the power of the Congress and the Executive to prescribe the policy in relation thereto. If the dams will destroy the fish industry

[19] The McNary Dam, now nearing completion, will require migratory fish to climb about ninety feet by means of ladders.

of the river, we are powerless to prevent it. It is admitted that the fish industry on the river is an important one and every known method should be used to preserve it. If it is the law (and we are not holding one way or another) that the Commission is held to the use of discretion in its requirements as to the preservation of any use to which a navigable stream is currently being put, we hold that the Commission has given the subject of the fishing industry due consideration and has not abused its discretion.

There is ample evidence to sustain the Commission in the exercise of its judgment that the Cowlitz Project is "best adapted to a comprehensive plan[20] for improving or developing a waterway [i.e., the Cowlitz River] * * * for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes".[21] Title 16 U.S.C.A. § 803(a).

We decline to interfere with the Commission's order.

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[20] The Federal Power Commission determined upon adequate evidence that the Lower Columbia River Fishery Plan is not inconsistent with the Federal Power Commission's plan for developing the Cowlitz River, since the license issued by the Commission for the construction of the Cowlitz Project requires the applicant City of Tacoma to provide facilities for the protection of the fish which spawn in the Cowlitz River.

[21] Cf. Finding No. 59 of the Commission, quoted supra as No. 24 of the summarized findings.

STATE OF WASHINGTON DEPARTMENT OF GAME ET AL.,
Petitioners,

v.

FEDERAL POWER COMMISSION AND CITY OF TACOMA.

No. 514.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

See same case below, 207 F. 2d 391.

Don Eastvold, Attorney General of Washington, and William E. Hicks, Lee Olwell, and Harold A. Peebles, Special Assistant Attorneys General, all of Olympia, Washington, and Stephen J. Morrissey, of Seattle, Washington, for petitioners.

Acting Solicitor General Robert L. Stern, Assistant Attorney General Warren E. Burger, and Melvin Richter, Lester S. Jayson, Willard W. Gatchell, John C. Mason, and Louis C. Kaplan, all of Washington, D. C., for respondent Federal Power Commission.

Clarence M. Boyle, Dean Barline, and E. K. Murray, all of Tacoma, Washington, for respondent City of Tacoma.

April 5, 1954. Denied. Mr. Justice Douglas is of the opinion certiorari should be granted.

APPENDIX E

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

TUESDAY, APRIL 30, 1957

Judgment

No. 33706

Thurston County No. 26572

THE CITY OF TACOMA, a municipal corporation,
Appellant and Cross-respondent,

v.

THE TAXPAYERS OF TACOMA, WASHINGTON, and ROBERT SCHOETTLER, as Director of Fisheries, and JOHN A. BIGGS, as Director of Game, of the State of Washington, and THE STATE OF WASHINGTON, a Sovereign State,
Respondents and Cross-appellants.

This cause having been heretofore submitted to the court, upon the transcript of the record of the Superior Court of Thurston County, and upon the argument of counsel, and the Court having fully considered the same and being fully advised in the premises, it is now, on this 30th day of April, A. D. 1957, on motion of John J. O'Connell, Attorney General, and Lynch and Lynch of counsel for respondents and cross-appellants, considered, adjudged and decreed, that the judgment of the said Superior Court be, and the same is hereby affirmed with costs; and that the said The Taxpayers of Tacoma, Washington, Robert Schoettler, as Director of Fisheries, John A. Biggs, as Director of Game, of the State of Washington, and The State of Washington, a Sovereign State, have and recover of and from the said The City of Tacoma, a municipal corporation, the costs of this action taxed and allowed at Seven hundred twenty-three and 64/100 ($723.64) Dollars, and

that execution issue therefor. And it is further ordered, that this cause be remitted to the said Superior Court for further proceedings, in accordance herewith.

Of Record in Journal 41 at
page 592
in the Office of the Clerk of
the Supreme Court

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF THURSTON

No. 26572

Judgment

THE CITY OF TACOMA, a municipal corporation,
Plaintiff,

v.

THE TAXPAYERS OF TACOMA, WASHINGTON; and ROBERT SCHOETTLER, as Director of Fisheries, and JOHN A. BIGGS, as Director of Game, of the State of Washington, and THE STATE OF WASHINGTON, a Sovereign State,
Defendants.

This matter coming on regularly for trial, without a jury, on the 11th day of January, 1956, on plaintiff's amended complaint, the amended answer and cross-complaint of defendants, State of Washington, Robert Schoettler, director of fisheries, and John A. Biggs, director of game, and the answer and affirmative defense of E. R. McKee, representative taxpayer; plaintiff appearing by E. K. Murray, special counsel, and Frank L. Bannon, chief assistant city attorney; defendants, State of Washington, Robert Schoettler, director of fisheries, and John A. Biggs,

director of game, appearing by Don Eastvold, attorney general, Joseph T. Mijich and E. P. Donnelly, assistant attorneys general; and E. R. McKee, defendant taxpayer, appearing by John S. Lynch; and a pretrial conference stipulation and order having heretofore been entered herein, and certain admissions in the pleadings having heretofore been made, and evidence, both oral and documentary, having been introduced at the trial and the cause submitted for decision, and the court having heretofore entered its findings of fact and conclusions of law; now, therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the question of the capacity of the plaintiff to acquire property of the defendant, State of Washington, by eminent domain is not within the jurisdiction of this court,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the question of damage to fish which might result from construction of plaintiff's Cowlitz Project was passed upon by the Federal Power Commission and the Federal Courts and is not now a proper one for consideration by this Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Sections 27 and 36, Chapter 117, Laws of 1917, as amended (R. C. W. 90.20.010 and 90.28.060) are inapplicable to said project insofar as the same conflict with the provisions of the Federal Power Act or the terms and conditions of plaintiff's License for said project, or insofar as they would enable State officials to exercise a veto over said project.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the provisions of Chapter 9, Laws of 1949, (R. C. W. 75.20.010 et seq), and Sections 46, and 49, Chapter 112, Laws of 1949, as amended (R. C. W. 72.20.050 and 75.20.100), are inapplicable to said project insofar as the same conflict with the provisions of the Federal Power Act or the terms and conditions of plaintiff's License for said

project, or insofar as they would enable State officials to exercise a veto over said project.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiff is acting illegally and in excess of its authority in the construction of the Mayfield and Mossyrock hydroelectric project as presently proposed for the reason that said project would necessarily impede, obstruct or interfere with public navigation contrary to the proviso of R. C. W. 80.40.010 et seq.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the injunction pendente lite, entered October 7, 1955, be continued in effect until July 1, 1956, from and after which later date plaintiff is hereby enjoined from spending any sums of money relating to the Mayfield and Mossyrock hydroelectric project.

Plaintiff excepts to the provisions of the last two paragraphs of this Judgment, the defendant Taxpayers except to the first paragraph of this Judgment and further except to the last paragraph as authorizing any further expenditure of sums of money, and Defendant State of Washington

excepts to the first three paragraphs of this Judgment, and all exceptions are hereby allowed.

DONE IN OPEN COURT this 6th day of March, 1956.

/s/ CHARLES T. WRIGHT
Judge

Presented by:
/s/ JOSEPH T. MIJICH
Assistant Attorney General
Attorney for Defendant Directors and the State of Washington

/s/ LYNCH & LYNCH
Attorneys for Defendant Taxpayer

Copy Received

/s/ E. K. MURRAY
of Attys for Plfl.

Filed Superior Court
Thurston County, Wash.
Mar 6 11 48 AM '56
PAUL PAULK, *Clerk*
By R. H.
Deputy

APPENDIX F

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 33706

Department

Order

THE CITY OF TACOMA, a municipal corporation,
Appellant,

v.

THE TAXPAYERS OF TACOMA, WASHINGTON; and ROBERT SCHOETTLER, as Director of Fisheries, and JOHN A. BIGGS, as Director of Game, of the State of Washington, and THE STATE OF WASHINGTON, a Sovereign State,
Respondents.

The court having considered the appellant's petition for a rehearing herein and its alternative petition for a clarification of the opinion heretofore filed herein, and reported in 149 Wash. Dec. 744, 307 P. (2d) 567, together with the answers thereto filed by the respondents The Taxpayers of Tacoma and The State of Washington, respectively,

NOW, THEREFORE, IT IS ORDERED that the petition for rehearing be and it is hereby denied.

AND IT IS FURTHER ORDERED that the petition for clarification be granted in part; and to achieve such clarification, an addition to the opinion heretofore filed and reported has been filed this day.

AND IT IS FURTHER ORDERED that the addition to the opinion filed this day be made a part of the opinion as published in Volume 49 (2d) of the Washington Reports.

Dated this 30th day of April, 1957.

By the Court:

/s/ MATTHEW W. HILL
Chief Justice

APPENDIX G

SUPREME COURT OF THE UNITED STATES

No.

OCTOBER TERM, 1957

THE CITY OF TACOMA, a municipal corporation,
Petitioner,

v.

THE TAXPAYERS OF TACOMA, WASHINGTON, and ROBERT SCHOETTLER, as DIRECTOR OF FISHERIES, *et al.*

Order Extending Time to File Petition for Writ of Certiorari

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 27th, 1957.

HUGO L. BLACK
Associate Justice of the Supreme Court of the United States.

Dated this 22nd
day of July. 1957